



MISSISSIPPI CODE 1972
Annotated

Civil Practice and Procedure

(§ 11-27-1 to
§ 11-69-1)

Title 11

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VOLUME 3A

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME THREE A
CIVIL PRACTICE
AND PROCEDURE
§§ 11-27-1 to 11-69-1

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2019 REGULAR LEGISLATIVE SESSION



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THE STATE OF MISSISSIPPI

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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL



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PUBLISHER'S FOREWORD

Volume 3A of the Mississippi Code of 1972 Annotated is a new volume added in 2019. It represents material that appeared in the original 1973 bound volume, the 2004 Replacement Volume 3, and the 2002 and 2012 Replacement Volume 4, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2019 Regular Session.

This volume contains the text of Title 11, Chapters 27 through 69 of the Mississippi Code of 1972 Annotated, as amended through the 2019 Regular Legislative Session. Title 11, Chapters 1 through 25, appear in Volume 3.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 3rd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal 2nd Series
Mississippi College Law Review
Mississippi Law Journal

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

PUBLISHER'S FOREWORD

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, 701 E. Water Street, Charlottesville, VA 22902-5389.

September 2019

LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
- Advance Sheets
- Amendment Notes
- Analyses
- Code Status
- Comparable Laws from other States
- Court Rules
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- Effective Dates
- Federal Aspects
- History Notes
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- Research and Practice References
- Statute Headings
- Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, 701 E Water Street, Charlottesville, VA 22902-5389.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted. Amendment notes are retained online indefinitely.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the State of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LAWS FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooperation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

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COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Laws from other States and Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Laws from other States*.

HISTORY NOTES

Each section of the Code is followed by a brief note showing the acts of the Legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

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The history note follows the section text, preceding any other annotations for the section. Information in the history note is listed in chronological order, first by Codes, then by Laws, with the most recent information listed last. If a section has been renumbered, the former number will appear in the history note.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

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Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

OPINIONS OF THE ATTORNEY GENERAL

Opinions of the Attorney General for the State of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant Code provisions under the heading "Opinions of the Attorney General."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation "§ 1-3-65," the first digit ("1") means the provision is in Title 1 ("Laws and Statutes"); the second ("3") indicates Chapter 3 ("Construction of Statutes"); and the last two digits ("65") mean the 65th section in that chapter ("Construction of terms generally").

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute sections or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article.

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REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

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§ 11-27-1. Who may exercise right of eminent domain.

Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, except as elsewhere specifically provided under the laws of the state of Mississippi.

HISTORY: Codes, 1942, § 2749-01; Laws, 1971, ch. 520, § 1, eff from and after January 1, 1972.

Cross References — Constitutional provision on taking of private property, see Miss. Const. Art. 3, § 17.

Acquisition of property by Gulf Regional District, see § 17-11-33.

Eminent domain powers of regional solid waste management authorities, see § 17-17-317.

Applicability of this chapter to county or regional railroad authorities, see § 19-29-19.

Municipality's power to acquire real property to create public utility system, see

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Boards of education having power of eminent domain to acquire leased sixteenth section or lieu land for the construction of school buildings, see § 29-3-88.

Condemnation proceedings of state building commission, see § 31-11-25.

Applicability of this chapter to school districts, see 37-7-301.

Acquisition of real estate for community hospitals and health centers in counties, municipalities, etc., see § 41-13-15.

Eminent domain in housing, see § 43-33-19.

Real Property Acquisition Policies Law, see §§ 43-37-1 et seq.

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Powers and duties of game and fish commission, see § 49-1-29.

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Compensation for removal of outdoor advertising, see § 49-23-17.

Powers of Pearl River Valley Water Supply District, see § 51-9-121.

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Powers of flood and drainage control district, see § 51-35-315.

Eminent domain in federal parks, see § 55-5-5.

Powers of bridge and park commissions, see §§ 55-7-7 et seq.

Eminent domain powers and duties as to industrial parks, see §§ 57-5-21, 57-5-23.

Mississippi Major Economic Impact Act, power relating to eminent domain, see § 57-75-11.

Acquisition of rights of way, land, etc., for state ports and harbors, see § 59-5-39.

Powers and authority of county which has port authority or development commission, see §§ 59-9-1 et seq.

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Acquisition of property for aviation purposes, see §§ 61-3-17, 61-5-7.

Eminent domain in control of highways, see § 65-1-47.

Boards of Supervisors exercising right of eminent domain, see § 65-33-23.

Power of eminent domain possessed by municipalities participating in joint project and joint agencies with respect to Joint Municipal Electric Power and Energy Law, see § 77-5-773.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

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1. In general.

To the extent that Chapter 27 makes provision for practice and procedure in eminent domain actions, it controls. However, Chapter 27 in and of itself is incomplete and stands supplemented by such rules of procedure, evidence and statute as otherwise apply to proceedings in the circuit or county court. *Mississippi State Highway Com. v. Herban*, 522 So. 2d 210, 1988 Miss. LEXIS 62 (Miss. 1988).

2. Right of eminent domain generally.

The evidence was sufficient to support a trial court's dismissal of a city's condemnation petition based on a finding of no public use where the city's contract with a gaming corporation for use of the land for the alleged purpose of urban renewal did not comply with § 43-35-19(b)'s competitive bidding requirement, and the city failed to provide conditions, restrictions, or covenants in its contract with the gaming corporation to ensure that the property would be used for the purpose of gaming enterprise or other related establishments. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 1994 Miss. LEXIS 548 (Miss. 1994).

A telephone company failed to meet the first prerequisite to the exercise of the statutory right of eminent domain where there was no evidence of valid, affirmative action on the part of the telephone company transforming the statutory authority of eminent domain into action. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

A New York corporation which provided long distance telephone service across the country was required to comply with state law and, as a condition precedent to the exercise of the statutory right of eminent domain pursuant to § 77-9-717, to submit to the jurisdiction of the Mississippi Public Service Commission and obtain the following: (1) a determination that the telephone company qualified as an entity to which the legislature had granted the power of eminent domain pursuant to §§ 11-27-1 and 77-9-717; (2) a determination that the telephone company had complied with state law in invoking the statutory power of eminent domain; and (3) a certificate of public convenience and necessity for the particular taking in question. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

Where an eminent domain case was tried by all the parties on the theory of compensation for a small strip of land and an entire building, a portion of which was located on the strip of land, the condemnor was entitled to enter upon the land and remove the building from the prop-

erty. *State Highway Com. v. Charmar, Inc.*, 569 So. 2d 1132, 1990 Miss. LEXIS 186 (Miss. 1990).

A superior governmental body may condemn the property of an inferior governmental body, and, consequently, the state highway commission has the power to condemn school property. *La Barreare v. Lambert*, 284 So. 2d 50, 1973 Miss. LEXIS 1246 (Miss. 1973).

The power of eminent domain is in derogation of the common law and should be construed favorably to the owner as against the condemner, which rule applies to the quantum of interest to be taken as well as to the extent of the power vested in the condemnor. *Nicholson v. Board of Mississippi Levee Comm'rs*, 203 Miss. 71, 33 So. 2d 604, 1948 Miss. LEXIS 233 (Miss. 1948).

The legislature has the power to define the quantum of interest or estate which may be taken, whether an easement or the fee or some estate intermediate these two; the power is limited to the express terms or clear implication of the statute. *Nicholson v. Board of Mississippi Levee Comm'rs*, 203 Miss. 71, 33 So. 2d 604, 1948 Miss. LEXIS 233 (Miss. 1948).

If the statute does not define the quantum of the estate to be taken, whether an easement or the fee or some intermediate estate, no greater estate can be taken than the particular public use requires. *Nicholson v. Board of Mississippi Levee Comm'rs*, 203 Miss. 71, 33 So. 2d 604, 1948 Miss. LEXIS 233 (Miss. 1948).

That State Highway Department had, prior to instituting condemnation proceeding, already appropriated land for highway purposes held not to deprive it of its right to thereafter condemn land for highway purposes, even though original appropriation was wrongful. *State Highway Dep't v. Campbell*, 173 Miss. 397, 161 So. 461, 1935 Miss. LEXIS 214 (Miss. 1935).

The right of eminent domain is limited to the express terms or necessary implications of the statute. *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453, 1910 Miss. LEXIS 174 (Miss. 1910).

Eminent domain rights are attributable to sovereignty and the right must be exercised with great caution and only in

cases of public necessity. *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453, 1910 Miss. LEXIS 174 (Miss. 1910).

This chapter [Code 1942, §§ 2749 et seq.] is limited in its application to persons or corporations having a right to condemn and the powers herein conferred cannot be availed of by corporations without authority to condemn. *Cumberland Tel. & Tel. Co. v. Morgan*, 92 Miss. 478, 45 So. 429, 1908 Miss. LEXIS 175 (Miss. 1908).

Const. 1890 § 17, making it a judicial question whether the contemplated use for which property is sought to be condemned is a public one, does not authorize the courts to determine the necessity for the taking. *Ham v. Board of Levee Comm'rs*, 83 Miss. 534, 35 So. 943, 1903 Miss. LEXIS 74 (Miss. 1903); *Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160, 1929 Miss. LEXIS 57 (Miss. 1929).

That a trespasser, not pretending to exercise it, had the power of eminent domain, does not exempt him from liability to punitive damages. *Cumberland Tel. & Tel. Co. v. Cassidy*, 78 Miss. 666, 29 So. 762, 1900 Miss. LEXIS 173 (Miss. 1900).

The general rule that "things affixed to the freehold by trespassers belong to the owner of the soil" is not applicable against a body having the right of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power. *Illinois C. R. Co. v. Le Blanc*, 74 Miss. 650, 21 So. 760, 1897 Miss. LEXIS 57 (Miss. 1897).

The proceeding under this chapter [Code 1942, § 2749] is to confer in a lawful way the right of a person or a corporation to take private property for public use after having made due compensation therefor. *Hopson v. Louisville, N. O. & T. R. Co.*, 71 Miss. 503, 15 So. 37, 1893 Miss. LEXIS 108 (Miss. 1893).

Neither the right of the company to condemn for a right of way nor the measure of compensation to which the landowner is entitled therefor, is in any way affected by the fact that such owner, in an action of trespass, had previously recovered of the company damages for having entered on the land and built and operated its railroad. *Hopson v. Louisville, N.*

O. & T. R. Co., 71 Miss. 503, 15 So. 37, 1893 Miss. LEXIS 108 (Miss. 1893).

3. Public utilities.

Prior to exercising the power of eminent domain in Mississippi, a New York corporation which provided long distance telecommunications across the country was required to prove that it was (1) a telephone company (2) which was constructing new lines and (3) had taken the necessary steps to invoke the power of eminent domain. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

A New York corporation which provided long distance telecommunications across the country would be entitled to invoke the power of eminent domain if it proved that it was a telephone company constructing new lines which had taken the necessary corporate steps to invoke the power of eminent domain and had obtained a certificate of public convenience and necessity from the Mississippi Public Service Commission. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

The special court of eminent domain properly dismissed a condemnation petition brought by a New York corporation, which provided long distance telephone service across the country, for failure to first obtain a certificate of public convenience and necessity from the Mississippi Public Service Commission as a condition precedent to the exercise of eminent domain by a public utility. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

The Mississippi Public Service Commission has the duty, authority, and therefore jurisdiction, over public utilities who come into the state of Mississippi and attempt to invoke the statutory right of eminent domain. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

The state is authorized to grant to a telegraph company the right to condemn property of a railroad company. *Western Union Tel. Co. v. Louisville & N. R. Co.*, 107 Miss. 626, 65 So. 650, 1914 Miss. LEXIS 129 (Miss. 1914), *aff'd*, 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032, 1919 U.S. LEXIS 1756 (U.S. 1919).

It requires statutory authority to empower telephone company to exercise the right of eminent domain. *Alabama & V. R. Co. v. Cumberland Tel. & Tel. Co.*, 88 Miss. 438, 41 So. 258, 1906 Miss. LEXIS 172 (Miss. 1906).

The showing that a telegraph company offering to condemn land is a dummy cannot be used as a defense of action. *Alabama & V. R. Co. v. Cumberland Tel. & Tel. Co.*, 88 Miss. 438, 41 So. 258, 1906 Miss. LEXIS 172 (Miss. 1906).

A railroad company is not debarred from condemning property because a former proceeding to condemn the same land had been dismissed by a justice of the peace and a petition for mandamus to compel him to proceed had been dismissed on demurrer in the circuit court. *Sullivan v. Yazoo & M. V. R. Co.*, 85 Miss. 649, 38 So. 33, 1904 Miss. LEXIS 177 (Miss. 1904).

4. Municipal corporations.

City may reopen street it has chosen to close; only requirement is that city reopen street through process of eminent domain as opposed to use of ordinance rescinding order closing street. *City of Jackson v. McAllister*, 475 So. 2d 432, 1985 Miss. LEXIS 2172 (Miss. 1985).

A suit for damages in anticipation that the city would close an alley in violation of statute, and that the State Highway Commission would enter upon the alley and obstruct it by a dirt embankment was prematurely brought where no damages had yet resulted. *Collins v. Mississippi State Highway Com.*, 233 Miss. 474, 102 So. 2d 678, 1958 Miss. LEXIS 405 (Miss. 1958).

A drainage district may have the right of eminent domain conferred upon them. *Riverside Drainage Dist. v. Buckner*, 108 Miss. 427, 66 So. 784, 1914 Miss. LEXIS 211 (Miss. 1914).

With reference to power of city under Const. 1890 art. 3 § 17. *Illinois C. R. Co. v. State*, 94 Miss. 759, 48 So. 561, 1909 Miss. LEXIS 355 (Miss. 1909).

A municipality does not have the right to take or damage private property for public use, different from that of another person or corporation having the right of eminent domain. *City of Jackson v. Wil-*

liams, 92 Miss. 301, 46 So. 551, 1908 Miss. LEXIS 242 (Miss. 1908).

5. Sewerage systems.

City could not be compelled to condemn complainant's whole right to construct sewerage system where public necessity only required equal easement with that of complainant. *City of Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160, 1929 Miss. LEXIS 57 (Miss. 1929).

6. Waterworks.

City's application to condemn right to construct waterworks system sufficiently described right sought to be condemned. *City of Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160, 1929 Miss. LEXIS 57 (Miss. 1929).

7. Right to compensation.

A restrictive covenant is an interest in real property for which due compensation must be paid upon a taking by the exercise of eminent domain powers. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

An actual taking or physical invasion of property is not the only basis for compensation. Damage to adjacent private property caused by public use is also compensable. Property is damaged when it is made less valuable. Personal inconvenience, discomfort, or interference with use is not compensable unless it results in the depreciation of value. Even then, compensation is not definite, but these factors are evidence of conditions which adversely affect the value of land. Persons owning property abutting streets have a right to reasonable access to their property from the street, and altering that access may damage the property. Where alteration of access, including light, air and view, diminishes the value of the property, the owner is entitled to compensation; such compensation is commonly termed consequential damages. *Gilich v. Mississippi State Highway Com.*, 574 So. 2d 8, 1990 Miss. LEXIS 778 (Miss. 1990).

The alteration of access to property requires compensation only where, and to the extent that, alteration of access diminishes the value of the property. Matters such as parking and increased difficulty in

maneuvering automobiles may likewise be considered to the extent of their adverse effect on property value. Additionally, loss of frontage that “moves” buildings and facilities closer to a roadway may adversely affect value and require compensation. However, compensation for such losses is due only to the extent that the damage is caused by governmental action as distinguished from landowner improvements. Thus, such losses are legally illusory where there has been no taking, but only a reclaiming of a right-of-way that the landowner has theretofore enjoyed and where the landowner has boxed himself or herself in by the manner in which he or she has constructed or purchased the improvements on the property. So long as, after the governmental action at issue, there remains access which would be reasonable if the property had been reasonably improved, no compensation is due. *City of Gulfport v. Anderson*, 554 So. 2d 873, 1989 Miss. LEXIS 441 (Miss. 1989).

8. —Construction and use of streets and highways.

A business’ use of a right-of-way, which was owned by the State Highway Commission, for customer parking for 50 years was permissive, such that the commission’s subsequent use of the right-of-way did not amount to a “taking,” since the business had knowledge of the commission’s interest in the right-of-way, even though the business paved the right-of-way for purposes of parking. *Mississippi State Highway Com. v. Hale*, 531 So. 2d 623, 1988 Miss. LEXIS 427 (Miss. 1988).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that abutting landowner was not entitled to damages resulting solely from inconvenience in entering and leaving his remaining property, provided that the public at large suffered the same inconvenience, was erroneous. *Carney v. Mississippi State Highway Com.*, 233 Miss. 598, 103 So. 2d 413, 1958 Miss. LEXIS 422 (Miss. 1958).

In a proceeding to condemn land for the construction of a cloverleaf at the intersec-

tion of certain highways, which had not been limited access highways, an instruction that the Highway Commission could construct the interchange on its right of way without payment of damages to an abutting property owner was erroneous, where it appeared that the construction included a high embankment near the owner’s land, and the commission had revoked the owner’s permit to enter the highway directly, so that his right of access to the highway was impaired. *Carney v. Mississippi State Highway Com.*, 233 Miss. 598, 103 So. 2d 413, 1958 Miss. LEXIS 422 (Miss. 1958).

Since the city had no power to close the alley except upon first making due compensation to the abutting landowners, if the city had closed the alley without making due compensation and the State Highway Commission had entered upon and obstructed it by a dirt embankment, the city and Highway Commission would have been jointly liable. *Collins v. Mississippi State Highway Com.*, 233 Miss. 474, 102 So. 2d 678, 1958 Miss. LEXIS 405 (Miss. 1958).

A street railway company, having authority to lay tracks in city streets, may run them across railroad company tracks in a street without condemnation proceedings. *Mississippi C. R. Co. v. Hattiesburg Traction Co.*, 109 Miss. 101, 67 So. 897, 1915 Miss. LEXIS 120 (Miss. 1915).

A railroad company under license from a municipality cannot construct its track along the public streets of a city without first making compensation for consequent damages to abutting owners, and this whether the fee of the street be in the owner or in the public. *Alabama & V. R. Co. v. Bloom*, 71 Miss. 247, 15 So. 72, 1893 Miss. LEXIS 204 (Miss. 1893).

9. —Change of grade of street or highway.

Compensation is required for a change of grade in a roadway which adversely affects the value of adjacent property, such as where a change in grade casts increased quantities of water upon the landowner’s property. *City of Gulfport v. Anderson*, 554 So. 2d 873, 1989 Miss. LEXIS 441 (Miss. 1989).

Statutes held to impliedly authorize payment by State Highway Commission

for damage to private property incurred through public use, as by change in grade of highway, although no land is actually appropriated. *Parker v. State Highway Com.*, 173 Miss. 213, 162 So. 162, 1935 Miss. LEXIS 242 (Miss. 1935).

City liable for damages for changing grade of street. *Funderburk v. Columbus*, 117 Miss. 173, 78 So. 1, 1918 Miss. LEXIS 161 (Miss. 1918).

By obstructing street city is liable for damages. *Funderburk v. Columbus*, 117 Miss. 173, 78 So. 1, 1918 Miss. LEXIS 161 (Miss. 1918).

10. Persons entitled to compensation or damages.

A landowner holding a reversionary interest in timber at the date the land was "taken" is entitled to introduce evidence to establish the value of the timber. *Pearl River Valley Water Supply Dist. v. Wright*, 186 So. 2d 205, 1966 Miss. LEXIS 1295 (Miss. 1966).

Where a highway, which had not been a limited access highway, was made into a nonaccess highway, this was the equivalent of an appropriation of the abutting property owner's right to have an easy way of access to the main highway. *Carney v. Mississippi State Highway Com.*, 233 Miss. 598, 103 So. 2d 413, 1958 Miss. LEXIS 422 (Miss. 1958).

Deed to county by one partner, to right of way for highway, divests only that partner's interest. *Smith v. Board of Sup'rs*, 124 Miss. 36, 86 So. 707, 1920 Miss. LEXIS 492 (Miss. 1920).

Equitable owner of property entitled to recover damages. *Funderburk v. Columbus*, 117 Miss. 173, 78 So. 1, 1918 Miss. LEXIS 161 (Miss. 1918).

The owner of land damaged by the taking of the land of another is entitled to recover such damages under Const. 1890 § 17. *Mayor, etc., of Vicksburg v. Herman*, 72 Miss. 211, 16 So. 434, 1894 Miss. LEXIS 96 (Miss. 1894); *Richardson v. Board of Mississippi Levee Comm'rs*, 77 Miss. 518, 26 So. 963, 1899 Miss. LEXIS 65 (Miss. 1899).

11. Due compensation of damages.

Homeowners who suffered additional damages allegedly attributable to a high-

way construction project a few years after the homeowners were compensated for the taking of their property by the condemning authority in an eminent domain action could not recover for the additional damages, even if those damages were not reasonably foreseeable at the time of the original eminent domain trial. *King v. Mississippi State Highway Com.*, 609 So. 2d 1251, 1992 Miss. LEXIS 590 (Miss. 1992).

Where a parcel of land was located in a commercial area and the only reason it had not been rezoned from residential to commercial use was the fact that it was known the property would be taken by condemnation for highway purposes, the highest and best use of the property was for commercial purposes and it should be valued as if it had been rezoned for such use. *Evans v. Mississippi State Highway Com.*, 197 So. 2d 805, 1967 Miss. LEXIS 1542 (Miss. 1967).

The time of taking, for the purpose of determining due compensation, is the date of the institution of the eminent domain suit and not the date of its trial. *Pearl River Valley Water Supply Dist. v. Wright*, 186 So. 2d 205, 1966 Miss. LEXIS 1295 (Miss. 1966).

On a condemnation of land for levee purposes, the owner is not entitled to any damages because a part of his land is left outside of the levee, but is entitled to damages caused by the levee itself, such as the obstruction of drainage on the land so situate. *Duncan v. Board of Mississippi Levee Comm'rs*, 74 Miss. 125, 20 So. 838, 1896 Miss. LEXIS 108 (Miss. 1896).

Where a railroad company has entered upon and held and used land for seven or eight years, without procuring a right of way by condemnation or otherwise, it is not entitled, on the owner's proceeding for an appraisalment of his damages under the charter, to have them estimated as of the time of the original taking, but they shall be estimated as of the date of the proceeding as diminished by their market value as a plantation, and without deduction on account of any supposed benefit realized from its construction. *Louisville, N. O. & T. R. Co. v. Hopson*, 73 Miss. 773, 19 So. 718, 1896 Miss. LEXIS 206 (Miss. 1896).

Measure of compensation to which the landowner is entitled for condemnation of a right of way by a railroad company is not affected by the fact that such owner, in an action of trespass, had previously recovered damages against the company for having entered on the land and built and operated its railroad. *Hopson v. Louisville, N. O. & T. R. Co.*, 71 Miss. 503, 15 So. 37, 1893 Miss. LEXIS 108 (Miss. 1893).

12. —Measure of compensation or damages.

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. *Dear v. Madison County by & Through Madison County Bd. of Supervisors*, 649 So. 2d 1260, 1995 Miss. LEXIS 32 (Miss. 1995).

Under the unit valuation method of determining compensation in an eminent domain proceeding, the jury is to determine the value of the property to be condemned and then to apportion the damages to those with an interest in the property, such as fee owners, mortgagees, lienholders and lessees. *State Highway Com. v. Rankin County Bd. of Education*, 531 So. 2d 612, 1988 Miss. LEXIS 429 (Miss. 1988).

The just compensation in a partial land taking case is generally the value of the part taken plus all damages which the residue of the property suffers, including a diminution in the value of the remainder. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

A partial taking which rendered the remainder unsuitable for continued use as a sawmill, the property's highest and best use, represented a loss bearing significantly on the owner's due compensation. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

The court's refusal to permit a condemnee's attorney to show the value of an undeveloped tract, a portion of which was taken for highway purposes, as lots, and to fix its value upon "front footage", was not reversible error, since, while it was appropriate that the jury consider that

the land had value as potential residential property, or other use for which the land might be adapted, it would be inappropriate for the jury to determine the present value of undeveloped land as if it were a residential or business subdivision. *Henry v. Mississippi State Highway Com.*, 231 So. 2d 778, 1970 Miss. LEXIS 1604 (Miss. 1970).

In eminent domain proceedings the value of land sought to be condemned had to be determined on the basis that the property was zoned residential at the time of the taking, since such fact affected its fair market value at the time of the taking, and although there was a reasonable probability that it could be rezoned commercial in the near future, the property could not be valued as if the rezoning had already been accomplished. *Mississippi State Highway Com. v. Wagley*, 231 So. 2d 507, 1970 Miss. LEXIS 1598 (Miss. 1970).

In eminent domain proceedings in order to apply the best use rule in determining the present value of land, mere speculative uses cannot be considered, but there must be some probability that the land would be used within a reasonable time for the particular use to which it is adapted or there must be a present demand for the land for such purpose or a reasonable expectation of such demand in the near future. *Mississippi State Highway Com. v. Wagley*, 231 So. 2d 507, 1970 Miss. LEXIS 1598 (Miss. 1970).

The rule is well settled that the present value of land sought to be condemned in eminent domain proceedings is not to be estimated simply with reference to the condition in which it is maintained or for the use to which it is at the time applied, but consideration must be given to the best or most valuable use to which the property is adapted. *Mississippi State Highway Com. v. Wagley*, 231 So. 2d 507, 1970 Miss. LEXIS 1598 (Miss. 1970).

Save in exceptional cases where part of a tract is taken, due compensation is the value of property taken and the damage done to the fair market value of the entire tract by the taking. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

Where the whole property is taken, the damages are its fair market value. *Green*

Acres Memorial Park, Inc. v. Mississippi State Highway Com., 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

Market value is what one desirous of purchasing would give at the present time to one willing to sell. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

Anticipated profits from the sale of lots are not an element of damages recoverable in condemnation of an unused portion of a cemetery. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

Evidence of the sale price of similar cemetery property is inadmissible in a proceeding to condemn an unused portion of cemetery property. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

That a witness's estimate of damage is based on the value of the portion taken, without stating the value of the entire tract before and after the taking, does not render it inadmissible, where he states that he did not regard the taking as damaging the remaining portion. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

The recent sale of comparable property in the vicinity may be shown, to establish the fair cash value of the land acquired. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

Evidence of the value of a cemetery as a going concern is not admissible in a proceeding to condemn an unused portion of its property. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

The anticipated profits from a cemetery business cannot be taken into consideration in determining the fair, cash market value of the land sought to be acquired. *Green Acres Memorial Park, Inc. v. Mississippi State Highway Com.*, 246 Miss. 855, 153 So. 2d 286, 1963 Miss. LEXIS 514 (Miss. 1963).

Where there was substantial evidence that landowner's property was worth approximately \$17,000 before the taking and \$2,000 after the taking, a judgment on a jury verdict in favor of the landowner for \$12,000 would be affirmed. *Mississippi State Highway Com. v. Gabbert*, 238 Miss. 687, 119 So. 2d 774, 1960 Miss. LEXIS 458 (Miss. 1960).

Witnesses estimating the fair market value of property to be condemned should apply the before-and-after rule. *Mississippi State Highway Com. v. Daniels*, 235 Miss. 185, 108 So. 2d 854, 1959 Miss. LEXIS 418 (Miss. 1959).

Inconvenience of crossing a highway dividing a parcel is not a proper separate item of damage for the taking of lands for the highway. *Mississippi State Highway Com. v. Daniels*, 235 Miss. 185, 108 So. 2d 854, 1959 Miss. LEXIS 418 (Miss. 1959).

Before a witness as to value may be cross-examined as to prices paid for neighboring lands, similarity and likeness of quality must be shown. *Mississippi State Highway Com. v. Daniels*, 235 Miss. 185, 108 So. 2d 854, 1959 Miss. LEXIS 418 (Miss. 1959).

The price of land similar to and of like quality to that involved in the case may be shown to weaken opinion evidence as to value. *Mississippi State Highway Com. v. Daniels*, 235 Miss. 185, 108 So. 2d 854, 1959 Miss. LEXIS 418 (Miss. 1959).

Under Code 1942, § 2775, municipality which dismissed an eminent domain proceeding became liable for counsel and expert witness fees incurred by the landowner in preparation of a defense to the proceeding. *City of Jackson v. Lee*, 234 Miss. 502, 106 So. 2d 892, 1958 Miss. LEXIS 524 (Miss. 1958).

Where private property is taken for public use, and there is a market price prevailing at the time and place of taking, that price is just compensation. *Anderson-Tully Co. v. United States*, 189 F.2d 192, 1951 U.S. App. LEXIS 3155 (5th Cir. Miss.), cert. denied, 342 U.S. 826, 72 S. Ct. 47, 96 L. Ed. 624, 1951 U.S. LEXIS 1614 (U.S. 1951).

Where only a part of a tract is taken in the exercise of eminent domain, the owner is entitled to recover damages not only for the part taken but also for injuries accru-

ing to the residue from the taking. *Mississippi State Highway Com. v. Dodson*, 207 Miss. 229, 42 So. 2d 179, 1949 Miss. LEXIS 332 (Miss. 1949).

When a portion of a parcel of land is to be taken for public use, owner is entitled to recover for injury to the remainder of that parcel only, and cannot recover for injury to separate and independent parcels of land which he may happen to own in the same neighborhood and in determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, "unity of use" is the principal test. *Mississippi State Highway Com. v. Dodson*, 207 Miss. 229, 42 So. 2d 179, 1949 Miss. LEXIS 332 (Miss. 1949).

If a tract of land, no part of which is taken, is used in connection with the same farm or enterprise, part of which was taken by eminent domain for public highway, it is not considered a separate and independent parcel merely because it was bought at different time, and separated by imaginary line, or even if the two tracts are separated by highway, railroad, or canal. *Mississippi State Highway Com. v. Dodson*, 207 Miss. 229, 42 So. 2d 179, 1949 Miss. LEXIS 332 (Miss. 1949).

Two separate tracts of land, one quarter mile apart, joined by a strip of land subsequently purchased to facilitate farming, cattle-raising, and dairying operations are not separate and independent parcels and can be considered as a unit in determining damage resulting from condemnation of a strip of land on one of the tracks for a public highway. *Mississippi State Highway Com. v. Dodson*, 207 Miss. 229, 42 So. 2d 179, 1949 Miss. LEXIS 332 (Miss. 1949).

The value of the land taken plus the damage, if any, to the remainder of the tract, testing that by the comparative value before and after such taking, is the correct rule for ascertaining the entire damage. *Mississippi State Highway Com. v. Burwell*, 206 Miss. 490, 39 So. 2d 497, 1949 Miss. LEXIS 275 (Miss.), modified, *In re Hart's Estate*, 206 Miss. 498, 40 So. 2d 263, 1949 Miss. LEXIS 277 (Miss. 1949).

Measure of damage to property not actually taken is difference between fair

market value of such property before, as compared to such value after, the taking. *Baker v. Mississippi State Highway Com.*, 204 Miss. 166, 37 So. 2d 169, 1948 Miss. LEXIS 352 (Miss. 1948).

While the jury must base its verdict on difference between before and after value of property, replacement, reconstruction and remedying costs may be shown and used as bearing upon accuracy, or inaccuracy, of amount of damage deduced from proof of comparative values. *Baker v. Mississippi State Highway Com.*, 204 Miss. 166, 37 So. 2d 169, 1948 Miss. LEXIS 352 (Miss. 1948).

Court may, in a proper case, allow interest as part of the damages or compensation to which the owner is entitled when property is taken under power of eminent domain. *Mississippi State Highway Com. v. Treas*, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

The formula for measuring compensation to be awarded the owner in an eminent domain proceeding, when a part of his land is taken for public use is: When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering the general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

The formula or the rule of before and after taking must be construed in connection with the facts of the case the court is then considering and the particular questions there presented for decision. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

An instruction on the measure of damages in an eminent domain proceeding that it is the difference between the fair market value of the property before taking and the fair market value of what remained after the land was taken and a public road constructed, cannot be complained of by the parties to the proceeding

because it failed to include the qualification that general benefits and injuries shared by the general public should not be considered, and that the market value of the land must be that immediately before and after the taking, since the landowner requested such instruction and the highway commission, seeking condemnation, was not harmed thereby where there was no evidence by the commission as to general benefits and no evidence by the landowner as to general injuries. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

The compensation awarded the landowner in an eminent domain proceeding is conclusively presumed to include all damages resulting to him from the proper use of the land taken, as in the case of a highway, the proper construction of the contemplated highway. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

Where the rule that the measure of damages in an eminent domain proceeding is the difference between the fair market value of the property before the taking and the fair market value after the taking, is applicable, the owner of the land cannot recover damages for specific injuries to the remaining land, although evidence of such injuries is competent, if, but not unless, they would affect the market value of the remaining land. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

A witness testifying as to the market value of the land before the taking for the construction of a highway and the market value after the taking, should not have been permitted, in arriving at the latter value, to take into consideration specific items of injury to the remaining land and the expense incurred thereby as separate

elements of damages. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

The value of trees on the land taken in a condemnation proceeding to condemn land for a state highway, could not be considered as a separate item of damage but was for consideration by the jury only in arriving at the value of the land on which they were, and it was erroneous to permit the introduction of such evidence as a separate item of damages. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

The inconvenience to the landowners, occasioned by the taking of land for the construction of a highway, to the effect that the construction of a highway increased the distance to be traveled to and from the owners' dwelling-house and a public road, and whether it could have been removed at a reasonable expense, was a fact to be considered by the jury in fixing the market value of the land remaining after the taking of a part thereof, but it was erroneous to permit its introduction as a separate item of damage. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

Evidence on the issue of damages in an eminent domain proceeding to take land for the construction of a state highway, that it would be necessary for the landowners to incur certain specific items of expense in the use and enjoyment of their remaining land, in such form as to suggest to the jury that each might be considered as a separate item of damage, and not simply as a fact bearing on the market value of the remaining land, such as the expense of building a fence on each side of the highway, rebuilding a chicken yard fence, re-establishing a fish-pond that was partly on the land taken, should not have been admitted. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

Measure of value held difference between market value of entire tract before and after taking. *State Highway Com. v. Day*, 181 Miss. 708, 180 So. 794, 1938 Miss. LEXIS 111 (Miss. 1938).

Measure of damages in condemnation proceedings is difference between fair market value of land before taking and fair market value of what remains after land is taken. *State Highway Com. v. Brown*, 176 Miss. 23, 168 So. 277, 1936 Miss. LEXIS 122 (Miss. 1936).

In estimating damages in condemnation proceeding, consideration must be given fair market value of property and all of its available uses and purposes and consequential damages which flow from the taking. *State Highway Com. v. Brown*, 176 Miss. 23, 168 So. 277, 1936 Miss. LEXIS 122 (Miss. 1936).

In eminent domain proceeding, adaptability of land for particular purpose is immaterial unless present market value is enhanced thereby. *State Highway Com. v. Brown*, 176 Miss. 23, 168 So. 277, 1936 Miss. LEXIS 122 (Miss. 1936).

In eminent domain proceeding, evidence concerning adaptability of land on railroad track for manufacturing enterprises which did not disclose probability that land would be put to such use within reasonable time held insufficient to furnish jury with standard upon which present fair market value of land could be determined. *State Highway Com. v. Brown*, 176 Miss. 23, 168 So. 277, 1936 Miss. LEXIS 122 (Miss. 1936).

In eminent domain proceeding, where court gave numerous instructions fixing measure of damages as difference between fair market value of land and buildings before taking and value of what remained after taking, inconsistent instruction fixing replacement value as measure of damages held reversible error, where jury awarded approximately highest estimate, according to replacement

value. *Mississippi State Highway Dep't v. Blackburn*, 172 Miss. 554, 160 So. 73, 1935 Miss. LEXIS 140 (Miss. 1935).

Measure of landlord's damage in condemnation proceedings. *Schlict v. Clark*, 114 Miss. 354, 75 So. 130, 1917 Miss. LEXIS 41 (Miss. 1917).

Evidence of enhanced value due to construction of railroad is not admissible in determining damages to property taken. *Romano v. Yazoo & M. V. R. Co.*, 87 Miss. 721, 40 So. 150, 1905 Miss. LEXIS 182 (Miss. 1905).

The measure of a railroad company's damages on condemnation of its right of way for a telegraph line is not the value of the land embraced within the right of way between the poles, and under the wires, but the extent to which the value of the use of such spaces by the railroad company is diminished by the telegraph company's use. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 So. 370, 1899 Miss. LEXIS 30 (Miss. 1899).

13. Review.

State Highway Department held not to have waived its right to appeal from judgment awarding damages in condemnation proceeding by fact that department had entered upon and appropriated the land, where appropriation had occurred prior to institution of condemnation proceeding. *State Highway Dep't v. Campbell*, 173 Miss. 397, 161 So. 461, 1935 Miss. LEXIS 214 (Miss. 1935).

14. Limitation of actions.

The six-year statute of limitations bars action for damages by construction of switch. *Romano v. Yazoo & M. V. R. Co.*, 87 Miss. 721, 40 So. 150, 1905 Miss. LEXIS 182 (Miss. 1905).

OPINIONS OF THE ATTORNEY GENERAL

Section 65-7-89 clearly authorizes the Board to institute eminent domain proceedings to gain parcels of land to construct a segment of state highway on the land. However, it may not use the quick take procedure of Section 11-27-1 et seq. *Welch*, August 9, 1996, A.G. Op. #96-0402.

The eminent domain powers of joint water management districts referred to in Section 51-8-33 are those set forth in Sections 11-27-1 through 11-27-51. *Applewhite*, Oct. 27, 2000, A.G. Op. #2000-0635.

RESEARCH REFERENCES

ALR.

Constitutional rights of owner as against destruction of building by public authorities. 14 A.L.R.2d 73.

Liability of condemnor in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 A.L.R.2d 1225.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street. 43 A.L.R.2d 1072.

Rights in respect of real-estate taxes where property is taken in eminent domain. 45 A.L.R.2d 522.

Fire hazard as element of damages on condemnation. 63 A.L.R.2d 313.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right. 4 A.L.R.3d 1137.

Plotting or planning in anticipation of improvement as taking or damaging of property affected. 37 A.L.R.3d 127.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation. 47 A.L.R.3d 1267.

Salting for snow removal as taking or damaging abutting property for eminent domain purposes. 64 A.L.R.3d 1239.

Eminent domain: right to condemn property owned or used by private educational, charitable, or religious organization. 80 A.L.R.3d 833.

Eminent domain: validity of appropriation of property for anticipated future use. 80 A.L.R.3d 1085.

Good will as element of damages for condemnation of property on which private business is conducted. 81 A.L.R.3d 198.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use. 22 A.L.R.4th 840.

Airport operations or flight of aircraft as constituting taking or damaging of property. 22 A.L.R.4th 863.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding. 23 A.L.R.4th 631.

Damages resulting from temporary conditions incident to public improvements or

repairs as compensable taking. 23 A.L.R.4th 674.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property. 62 A.L.R.4th 1183.

Right of out-of-state property owner to commence in, or remove to, federal court action involving taking of property by state, local, government, or agency thereof. 4 A.L.R. Fed. 236.

Am. Jur.

26 Am. Jur. 2d, Eminent Domain §§ 17 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration – For condemnation – By state agency – For state transportation facility).

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 303.1 (Answer-State-ment of defendant's interest in property-Allegations of damage to business and remaining property).

7 Am. Jur. Legal Forms 2d, Eminent Domain §§ 97:15-97:17 (Acts preliminary to exercise of power of eminent domain).

7B Am. Jur. Legal Forms 2d, Eminent Domain §§ 97:29 et seq. (compensation).

11 Am. Jur. Trials, Condemnation of Urban Property, §§ 1 et seq.

10 Am. Jur. Proof of Facts 2d, Eminent Domain: Lack of Necessity for Taking Property, §§ 9 et seq. (proof of lack of reasonable necessity for taking property for urban renewal project).

28 Am. Jur. Proof of Facts 2d 615, Eminent Domain: Traffic Noise and Vibration.

19 Am. Jur. Proof of Facts 3d 613, Highest and Best Use of Property Taken Under Eminent Domain.

CJS.

29A C.J.S., Eminent Domain §§ 24 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

§ 11-27-3. Court of eminent domain.

A special court of eminent domain is hereby created, to consist of a judge, jury, and such other officers and personnel as hereinafter set out, and it shall have and exercise the jurisdiction and powers hereinafter enumerated. The original powers and jurisdiction shall be and is hereby fixed in the county court in each county that has elected to come under the provisions of Section 9-9-1 Mississippi Code of 1972, or that may hereafter come under the provisions of said Section 9-9-1, and in every other county of this state, the original powers and jurisdiction shall be and is hereby fixed in the circuit court of such county, which said powers and jurisdiction may be exercised in full either in termtime or vacation, or both.

HISTORY: Codes, 1942, § 2749-02; Laws, 1971, ch. 520, § 2, eff from and after January 1, 1972.

Cross References — Jurisdiction of county courts generally, see § 9-9-21.

Term of court of eminent domain, see § 11-27-29.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Since the original powers and jurisdiction of the special court of eminent domain are fixed in the county or circuit courts, as provided in § 11-27-3, the discovery provisions of §§ 13-1-201 through 13-1-271 apply to proceedings in the special court as well as to other civil proceedings in the county and circuit courts. Thus, in a proceeding by owners of property condemned as a result of the relocation of a state highway, the special court of eminent domain erred in refusing to extend the discovery statutes to the condemnation proceeding. *Barrett v. State Highway Com.*, 385 So. 2d 627, 1980 Miss. LEXIS 2031 (Miss. 1980).

When a special court of eminent domain concludes the matter or matters for which it was convened and a final judgment is entered, it automatically goes out of existence and no longer has jurisdiction to hear and determine any matters filed thereafter, unless an order has been entered on its minutes granting additional

time with which to file such matters. This rule is the same whether the court is convened in vacation or during a regular term of the circuit or county court. *Mississippi State Highway Com. v. First Methodist Church, Inc.*, 323 So. 2d 92, 1975 Miss. LEXIS 1556 (Miss. 1975).

By way of pendant jurisdiction, the eminent domain court is allowed to decide questions of title where the issue arises from the "common nucleus of operative fact." In other words, where the eminent domain court has subject matter jurisdiction of a condemnation proceeding as established in the pleadings, the court may determine any questions of title which may arise from the proceedings. To the extent that *Evans v. Mississippi Power Company* (Miss. 1968) 206 So. 2d 321 and *Whitehead v. Mississippi State Highway Commission* (Miss. 1971) 254 So. 2d 347 hold otherwise, they are overruled. *McDonald's Corp. v. Robinson Industries, Inc.*, 592 So. 2d 927, 1991 Miss. LEXIS 526 (Miss. 1991).

RESEARCH REFERENCES

ALR.

Construction and application of rule re-

quiring public use for which property is condemned to be "more necessary" or

“higher use” than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.S.) in condemnation proceedings by United States. 164 A.L.R. Fed. 341.

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 365 et seq.

CJS.

29A C.J.S., Eminent Domain §§ 337–339 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue – Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Evidence of Business Factors in Condemnation Proceedings Concerning Certificates of Public Convenience and Necessity. 52 Miss. L. J. 927, December 1982.

§ 11-27-5. Complaint to condemn; parties; preference.

Any person or corporation having the right to condemn private property for public use shall file a complaint to condemn with the circuit clerk of the county in which the affected property, or some part thereof, is situated and shall make all the owners of the affected property involved, and any mortgagee, trustee or other person having any interest therein or lien thereon a defendant thereto. The complaint shall be considered a matter of public interest and shall be a preference case over other cases except other preference causes. The complaint shall describe in detail the property sought to be condemned, shall state with certainty the right to condemn, and shall identify the interest or claim of each defendant.

HISTORY: Codes, 1942, § 2749-03; Laws, 1971, ch. 520, § 3; Laws, 1991, ch. 573, § 61, eff from and after July 1, 1991.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Venue.
3. Parties.
4. Description of property.

1. In general.

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a quick-take condemnation action without notice of the misfiled deed. *Harrison County Util. Auth. v. Walker*, 143 So. 3d 608, 2014 Miss. App. LEXIS 19 (Miss. Ct.

App.), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 386 (Miss. 2014).

Under the requirement of this section [Code 1942, § 2751] that an application to condemn land must describe the land sought to be condemned with certainty, the petition in a condemnation proceeding which described property “exclusive of the right of way of present Mississippi Highway No. 63” was insufficient to describe that part of the condemnee’s property subject to condemnation, in view of a dispute between the condemnee and the highway commission as to the extent of the right-of-way. *Whitehead v. Mississippi State Highway Com.*, 254 So. 2d 357, 1971 Miss. LEXIS 1254 (Miss. 1971), but see *McDon-*

ald's Corp. v. Robinson Industries, Inc., 592 So. 2d 927, 1991 Miss. LEXIS 526 (Miss. 1991).

Prior to exercising the power of eminent domain in Mississippi, a New York corporation which provided long distance telecommunications across the country was required to prove that it was (1) a telephone company (2) which was constructing new lines and (3) had taken the necessary steps to invoke the power of eminent domain. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

A telephone company failed to meet the first prerequisite to the exercise of the statutory right of eminent domain where there was no evidence of valid, affirmative action on the part of the telephone company transforming the statutory authority of eminent domain into action. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

The special court of eminent domain properly dismissed a condemnation petition brought by a New York corporation, which provided long distance telephone service across the country, for failure to first obtain a certificate of public convenience and necessity from the Mississippi Public Service Commission as a condition precedent to the exercise of eminent domain by a public utility. *American Tel. & Tel. Co. v. Purcell Co.*, 606 So. 2d 93, 1990 Miss. LEXIS 790 (Miss. 1990).

In an eminent domain action, the proper procedure to determine compensation under the unit valuation method is to file the petition against all persons and parties claiming an interest in the property sought to be condemned and for the jury to determine the value of the property being condemned and then to apportion the damages to the proper parties, in this case a fee holder and a leaseholder. The State Highway Commission's partial appeal from that portion of the verdict awarded to the leaseholder would be dismissed, where the Commission was not appealing the total verdict, and had already paid the portion awarded to the fee holder, who was no longer a party to the litigation. *Lennepe v. Mississippi State Highway Com.*, 347 So. 2d 341, 1977 Miss. LEXIS 2034, 1977 Miss. LEXIS 2035 (Miss. 1977).

Where, following the establishment by an inverse condemnation suit of an aviation easement against landowners' property but before assessment of damages therefor, the airport condemned said property in an eminent domain proceeding, the compensation paid the landowners in the eminent domain proceeding did not preclude them from recovering damages for the previously taken easement. *Wright v. Jackson Municipal Airport Authority*, 300 So. 2d 805, 1974 Miss. LEXIS 1646 (Miss. 1974).

Under the requirement of this section [Code 1942, § 2751] that an application to condemn land must describe the land sought to be condemned with certainty, the petition in a condemnation proceeding which described property "exclusive of the right of way of present Mississippi Highway No. 63" was insufficient to describe that part of the condemnee's property subject to condemnation, in view of a dispute between the condemnee and the highway commission as to the extent of the right-of-way. *Whitehead v. Mississippi State Highway Com.*, 254 So. 2d 357, 1971 Miss. LEXIS 1254 (Miss. 1971), but see *McDonald's Corp. v. Robinson Industries, Inc.*, 592 So. 2d 927, 1991 Miss. LEXIS 526 (Miss. 1991).

Where a company seeks to condemn a power line right of way, together with any and all "danger trees" then or thereafter growing beyond the limits of the right of way, the condemnee is entitled to a bill of particulars requiring the condemnor to designate the number, kind, and location of the trees which are presently to be cut as "danger trees." *Mississippi Power Co. v. Leggett*, 197 So. 2d 475, 1967 Miss. LEXIS 1527 (Miss. 1967).

By requiring a company desiring to condemn a power line right of way and "danger trees" growing beyond the limits of the right of way to designate the number, kind, and location of the "danger trees" which are presently to be cut and severed, the jury can determine to what extent the rights of the condemnee will be invaded by the condemnor, which trees will be similarly cut within the next 5 or 10 years, and the extent to which the condemnor's right of ingress and egress for the purpose of cutting will damage the condemnee. *Mis-*

Mississippi Power Co. v. Leggett, 197 So. 2d 475, 1967 Miss. LEXIS 1527 (Miss. 1967).

A petition to condemn an electric power line right of way and "danger trees," described in the petition is any and all trees then or thereafter growing beyond the limits of the right of way, any part of which would, in falling directly toward the line, strike any structure or conductor of the line, or come within 5 feet of any conductor or structure, described with sufficient accuracy the property sought to be condemned within the meaning of this section [Code 1942, § 2751]. *Mississippi Power Co. v. Leggett*, 197 So. 2d 475, 1967 Miss. LEXIS 1527 (Miss. 1967).

The application need not name and particularize the use or uses of the land to be condemned. *Horne v. Pearl River Valley Water Supply Dist.*, 249 Miss. 358, 162 So. 2d 504, 1964 Miss. LEXIS 398 (Miss. 1964).

The taking of land for a public purpose which is primary and paramount will not be defeated by the fact that a private use or benefit which would not of itself warrant condemnation will result. *Horne v. Pearl River Valley Water Supply Dist.*, 249 Miss. 358, 162 So. 2d 504, 1964 Miss. LEXIS 398 (Miss. 1964).

The taking of land adjacent to a water storage reservoir is not precluded by the location thereon of a service center for recreation seekers. *Horne v. Pearl River Valley Water Supply Dist.*, 249 Miss. 358, 162 So. 2d 504, 1964 Miss. LEXIS 398 (Miss. 1964).

Holding power company cutting trees in making survey with a view to condemnation, not liable to statutory penalty. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546, 1962 Miss. LEXIS 536 (Miss. 1962).

The statement of rights sought to be condemned may, on an appeal to the circuit court, be amended so as to exclude rights not desired. *Mississippi State Highway Com. v. Daniels*, 235 Miss. 185, 108 So. 2d 854, 1959 Miss. LEXIS 418 (Miss. 1959).

Every essential prerequisite to the jurisdiction prescribed by statute must be complied with and such prerequisite must affirmatively appear on the face of the proceeding. However, a substantial com-

pliance is sufficient. *Western Union Tel. Co. v. Louisville & N. R. Co.*, 107 Miss. 626, 65 So. 650, 1914 Miss. LEXIS 129 (Miss. 1914), *aff'd*, 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032, 1919 U.S. LEXIS 1756 (U.S. 1919).

2. Venue.

Because the landowners' claims under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., were disposed of at summary judgment, their claim of a taking had to be brought as a separate action with venue fixed in the Circuit Court of Jackson County, the situs of the property. *Dunston v. Miss. Dep't of Marine Res.*, 892 So. 2d 837, 2005 Miss. App. LEXIS 66 (Miss. Ct. App. 2005).

3. Parties.

Under subsection (2)(d), a person who claims an easement by prescription across condemned land should be made a party to a condemnation proceeding. *Bishop v. Mississippi Transp. Comm'n*, 734 So. 2d 218, 1999 Miss. App. LEXIS 28 (Miss. Ct. App. 1999).

The purchaser of land at a tax sale, even prior to the expiration of the period of redemption, is a necessary party to an eminent domain action, where the provisions of Code 1942, §§ 9935 and 9936 had been complied with. *Mississippi State Highway Com. v. Casey*, 253 Miss. 685, 178 So. 2d 859, 1965 Miss. LEXIS 1033 (Miss. 1965).

The objection of nonjoinder of necessary parties required hereunder is not available to a party not affected thereby. *Dantzler v. Mississippi State Highway Com.*, 190 Miss. 137, 199 So. 367, 1941 Miss. LEXIS 42 (Miss. 1941).

Condemner must determine at his peril the names of the owner and other persons having an interest in or lien on the premises sought to be condemned. *Mississippi State Highway Com. v. West*, 181 Miss. 206, 179 So. 279, 1938 Miss. LEXIS 63 (Miss. 1938).

Person named as defendant who has no interest in property, held not entitled to compensation. *Mississippi State Highway Com. v. West*, 181 Miss. 206, 179 So. 279, 1938 Miss. LEXIS 63 (Miss. 1938).

Where sublease had expired prior to institution of condemnation proceedings,

sublessees, made parties to the proceedings, were entitled at most to only nominal damages. *Mississippi State Highway Com. v. West*, 181 Miss. 206, 179 So. 279, 1938 Miss. LEXIS 63 (Miss. 1938).

Doctrine of estoppel by judicial admissions held not to apply to condemnation proceedings. *Mississippi State Highway Com. v. West*, 181 Miss. 206, 179 So. 279, 1938 Miss. LEXIS 63 (Miss. 1938).

A person not having the right to condemn property will not be aided by unit-

ing in the petition, over the protest of the owner of the property, a corporation having the right to condemn. *Cumberland Tel. & Tel. Co. v. Morgan*, 92 Miss. 478, 45 So. 429, 1908 Miss. LEXIS 175 (Miss. 1908).

4. Description of property.

The statute does not require that an eminent domain property description be expressed in terms of metes and bounds. *Ford v. Destin Pipeline Co.*, 809 So. 2d 573, 2000 Miss. LEXIS 118 (Miss. 2000).

RESEARCH REFERENCES

ALR.

Intervention in condemnation proceedings by adjoining landowners claiming consequential damage. 61 A.L.R.2d 1292.

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 416 et seq.

9 Am. Jur. Pl and Pr Forms (Rev), Eminent Domain, Forms 1 et seq. (Com-

mencement of condemnation proceedings).

13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds §§ 179:245, 179:245.1 (condemnation award).

CJS.

29A C.J.S., Eminent Domain § 483 et seq.

§ 11-27-7. Filing complaint; lis pendens; time and place of hearing; notice; pleadings.

The complaint shall be filed with the circuit clerk and shall be assigned a number and placed on the docket as other pleadings in circuit court or county court. The plaintiff shall also file a lis pendens notice in the office of the chancery clerk immediately after filing the complaint. The circuit clerk, or the plaintiff by his attorney, shall forthwith present such complaint to the circuit judge or county judge, as the case may be, who shall by written order directed to the circuit clerk fix the time and place for the hearing of the matter, in termtime or vacation, and the time of hearing shall be fixed on a date to allow sufficient time for each defendant named to be served with process as is otherwise provided by the Mississippi Rules of Civil Procedure, for not less than thirty (30) days prior to the hearing. If a defendant, or other party in interest, shall not be served for the specified time prior to the date fixed, the hearing shall be continued to a day certain to allow the thirty-day period specified. Not less than twenty (20) days prior to the date fixed for such hearing, the plaintiff shall file with the circuit clerk and serve upon the defendants, or their respective attorneys, a statement showing: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the plaintiff. Not less than ten (10) days prior to the date fixed for such hearing, each of the defendants shall file with the circuit clerk and serve upon the plaintiff, or his attorney, a statement showing: (1) the fair

market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the defendants. In each such instance, both the plaintiff and the defendant shall set out in such statement the asserted highest and best use of the property and shall itemize the elements of damage, if any, to the remainder if less than the whole is taken. The statements required by this section shall constitute the pleadings of the parties with respect to the issue of value, and shall be treated as pleadings are treated in civil actions in the circuit court. The judge, for good cause shown, may increase or decrease the time for pleading by the plaintiff or by the defendant.

HISTORY: Codes, 1942, § 2749-04; Laws, 1971, ch. 520, § 4; Laws, 1991, ch. 573, § 62, eff from and after July 1, 1991.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Secretary of State had a clear interest in the property, and pursuant to Miss. Code Ann. § 7-11-11, which enumerated the duties and powers of the Secretary of State, the property was to come under the Secretary of State's charge once the redemption period was over, and this entitled the Secretary of State to be recognized in the eminent domain proceedings; if the Department of Finance and Administration had strictly followed the procedural requirements of § 11-27-7, it would have named the Secretary of State as a defendant. *Smith v. Jackson State Univ.*, 995 So. 2d 88, 2008 Miss. LEXIS 454 (Miss. 2008).

Although § 11-27-7 states that the landowners will not be required to submit their statement of values until 10 days before trial, that does not mean that experts' opinions and the bases therefor are not discoverable. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

A trial court should not have entered a default judgment in an eminent domain proceeding merely because the State Highway Commission failed to file a statement of values as required by § 11-27-7 where the only issue was the amount of damages that the landowner would receive from the Commission, both parties came to trial ready to proceed, the land-

owner would not have been prejudiced by an extension of time for the Commission to file the statement, and the landowner knew to what extent the Commission valued the land because the parties had been involved in unsuccessful negotiations concerning the value of the land. *State Highway Com. v. Hyman*, 592 So. 2d 952, 1991 Miss. LEXIS 974 (Miss. 1991).

Statements of value in an eminent domain proceeding are to be treated as pleadings are treated in civil causes in the circuit court and thus may be amended. *Hudspeth v. State Highway Com.*, 534 So. 2d 210, 1988 Miss. LEXIS 546 (Miss. 1988).

Before either party in an eminent domain proceeding may complain of a variance from the statement of values, timely objection must be tendered when the opposition seeks to exceed the statement of values. Failure of objection results in waiver of the point. *Mississippi State Highway Com. v. Viverette*, 529 So. 2d 896, 1988 Miss. LEXIS 321 (Miss. 1988).

Admission of testimony of landowner regarding loss of profits was reversible error due to uncertainty and speculation involved in future of any business; testimony of landowner regarding future profits was even more speculative because landowner did not even have business located on property condemned on date of filing of application for special court of

eminent domain. *State Highway Com. v. Smith*, 511 So. 2d 881, 1987 Miss. LEXIS 2494 (Miss. 1987).

Mississippi recognizes before and after rule in determining measure of damages when part of tract of land is taken for public use, and while testimony as to comparable land sales is admissible in establishing fair market value of condemned property, it is error to allow jury to consider evidence of sales of non-comparable property; appraisers for landowner failed to establish probability that subject land would either be used within reasonable time for commercial purposes, or that there was demand for such property for those purposes. *State Highway Com. v. Smith*, 511 So. 2d 881, 1987 Miss. LEXIS 2494 (Miss. 1987).

Highway Department had not waived its right to claim less damage than amount in statement of values filed in eminent domain court by failing to assert lesser amount at trial and before Supreme Court, where statute makes statement of values filed by Highway Department a pleading. *State Highway Com. v. McDonald's Corp.*, 509 So. 2d 856, 1987 Miss. LEXIS 2449 (Miss. 1987).

In an eminent domain proceeding to condemn a 1.52-acre strip of land out of a six-acre tract, a fatal variance existed between the highway commission's statement of value, which constituted its pleadings on the issue of value, and its proof, where, at trial, the commission's only appraiser testified that the landowner's total damages were 40% less than that con-

tained in its filed statement of value. *Tyson, Inc. v. Mississippi State Highway Com.*, 367 So. 2d 939, 1979 Miss. LEXIS 2229 (Miss. 1979).

The judge in a special court of eminent domain did not abuse his discretion by entering an order nunc pro tunc allowing the landowner to file his amended statement of values on the day of trial where the record did not show that the commission was prejudiced thereby. *Mississippi State Highway Com. v. Amos*, 319 So. 2d 231, 1975 Miss. LEXIS 1478 (Miss. 1975).

The requirement that all parties of interest be made parties and be duly notified by proper process is not directory, but must be strictly followed; thus, a mortgagee was an interested party and had to be summoned where she had a lien on the property sought to be condemned, and it was not sufficient that the trustee was summoned as an agent of the mortgagee. *New v. State Highway Com.*, 297 So. 2d 821, 1974 Miss. LEXIS 1543 (Miss. 1974).

Although a trial judge has the authority to increase or decrease the time for pleading by the parties under § 11-27-7, the exercise of this prerogative is motivated only "for the good cause shown" by its terms, thus placing the invocation of the prerogative within the discretion of the trial judge. *Coleman v. Mississippi State Highway Com.*, 289 So. 2d 918, 1974 Miss. LEXIS 1693 (Miss. 1974).

Pleadings relating to value are required by § 11-27-7; and without them this chapter becomes meaningless. *Coleman v. Mississippi State Highway Com.*, 289 So. 2d 918, 1974 Miss. LEXIS 1693 (Miss. 1974).

RESEARCH REFERENCES

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 365 et seq.

7B Am. Jur. Legal Forms 2d, Eminent Domain §§ 97:39 et seq. (appraisers and appraisals).

CJS.

29A C.J.S., Eminent Domain §§ 337-339 et seq.

§ 11-27-9. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.
[Codes, 1942, § 2749-05; Laws, 1971, ch. 520, § 5]

Editor's Notes — Former § 11-27-9 pertained to the situation where the owner of

the land sought to be condemned was an infant, person of unsound mind, a nonresident, or a deceased person.

§ 11-27-11. Operation of court.

The circuit clerk shall deliver a copy of said order of the court fixing the time and place for the hearing to the sheriff of the county and to the official court reporter. The sheriff shall attend the court and execute all process. The court reporter shall take the testimony. The circuit clerk, in the presence of the sheriff and chancery clerk, shall draw from the jury box of the court the names of twenty-four (24) jurors, or such numbers of jurors as shall be ordered by the court, who shall serve in said court, and shall issue a venire facias to the sheriff, commanding him to summon the jurors so drawn to appear at the time and place designated by the order of the court. All acts and actions of the clerk and sheriff, including the return endorsed on each summons issued, shall be filed by the clerk and made a part of the record in the cause.

HISTORY: Codes, 1942, § 2749-06; Laws, 1971, ch. 520, § 6, eff from and after January 1, 1972.

Cross References — Juries in condemnation proceedings, see § 13-5-89.
Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Principal and surety on injunction bond given in suit to restrain eminent domain proceeding held not liable for damages

consisting of fees paid jurors, who neither attended nor served. *Gwin v. Greenwood*, 159 Miss. 110, 131 So. 821, 1931 Miss. LEXIS 18 (Miss. 1931).

RESEARCH REFERENCES

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 485 et seq.

CJS.

29A C.J.S., Eminent Domain §§ 560, 570, 577-579, 593, 594 et seq.

§ 11-27-13. Separate trials; to injury or to court.

Each different property, identified by separate ownership, shall constitute a separate civil action and shall require a separate trial, unless otherwise agreed by all parties with the approval of the court. Trial shall be to a jury which shall be examined and impaneled in accordance with the Mississippi Rules of Civil Procedure. Alternatively, trial may be to the court, as provided by the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1942, § 2749-07; Laws, 1971, ch. 520, § 7; Laws, 1991, ch. 573, § 63, eff from and after July 1, 1991.

Cross References — Number of jurors in county court actions, see Miss. R. Civ. P. 48.
Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

In an eminent domain action, the proper procedure to determine compensation under the unit valuation method is to file the petition against all persons and parties claiming an interest in the property sought to be condemned and for the jury to determine the value of the property being condemned and then to apportion the damages to the proper parties, in this case a fee holder and a leaseholder. The State Highway Commission's partial appeal from that portion of the verdict awarded to the leaseholder would be dismissed, where the Commission was not appealing the total verdict, and had already paid the portion awarded to the fee holder, who was no longer a party to the litigation. *Lennep v. Mississippi State Highway Com.*, 347 So. 2d 341, 1977 Miss. LEXIS 2034, 1977 Miss. LEXIS 2035 (Miss. 1977).

In condemnation proceedings where the application seeks to condemn the property of more than one defendant interested in different properties, a separate trial must be had for each and, in proceedings by an applicant for a right of way for a private road across the lands of several owners a separate trial should be granted in the circuit court to each of the several landowners to determine the damages done to the various parcels of land. *Rotenberry v. Renfro*, 214 So. 2d 275, 1968 Miss. LEXIS 1297 (Miss. 1968).

Where the interests of both the landlord and his tenant in the same lands is sought to be condemned in the same action, this section [Code 1942, § 2756], requiring separate trials in the case of owners of different properties, is not applicable. *Smith v. Mississippi State Highway Com.*, 252 Miss. 883, 174 So. 2d 374, 1965 Miss. LEXIS 1157 (Miss. 1965).

RESEARCH REFERENCES

ALR.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award. 94 A.L.R.3d 696.

Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.S.) in condemnation proceedings by United States. 164 A.L.R. Fed. 341.

Dismissal, under Rule 71A(i)(3) of Fed-

eral Rules of Civil Procedure, of defendant unnecessarily or improperly joined in condemnation action. 57 A.L.R. Fed. 490.

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 485 et seq.

CJS.

29A C.J.S., Eminent Domain §§ 535 et seq.

§ 11-27-15. Dismissal; grounds; appeal.

Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the complaint and in the same court where the complaint is pending, serve and file a motion to dismiss under the Mississippi Rules of Civil Procedure for failure to state a claim upon which relief can be granted on any of the following grounds: (1) that the plaintiff seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. Any such motion, if served and filed, shall be heard and decided by the judge as a

preference proceeding, without a jury, prior to the hearing on the complaint. Any party may appeal directly to the Supreme Court from an order overruling or granting any such motion to dismiss, as in other cases, but if the order be to overrule the motion, the appeal therefrom shall not operate as a supersedeas and the court of eminent domain may nevertheless proceed with the trial on the complaint. Any appeal from an order overruling or granting a motion to dismiss shall be a preference action in the Supreme Court and advanced on the docket as appropriate.

HISTORY: Codes, 1942, § 2749-08; Laws, 1971, ch. 520, § 8; Laws, 1991, ch. 573, § 64, eff from and after July 1, 1991.

Cross References — Separate causes of action and impaneling the jury, see § 11-27-13.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Appeals.

1. In general.

Special court of eminent domain erred as a matter of law when it granted a petition for private road access because the Mississippi Constitution provided that such rights of way were not permissible in incorporated cities and towns. The right to seek dismissal under the Mississippi Constitution was not waived because the statutory grounds for such were not satisfied where a private road was requested, rather than a public taking; moreover, public necessity or public use did not have to be shown. *High v. Kuhn*, 191 So. 3d 113, 2016 Miss. LEXIS 121 (Miss. 2016).

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a quick-take condemnation action without notice of the misfiled deed. *Harrison County Util. Auth. v. Walker*, 143 So. 3d 608, 2014 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 386 (Miss. 2014).

Dismissal of an eminent domain proceeding under Miss. Code Ann. § 11-27-15 was properly denied because two owners were unable to show that an electric asso-

ciation's taking was not for public use, and any incidental benefit to surrounding landowners did not defeat the taking of the owners' property; the association wanted to construct a power line to supply its customers with adequate voltage. *Knight v. S. Miss. Elec. Power Ass'n*, 943 So. 2d 81, 2006 Miss. App. LEXIS 667 (Miss. Ct. App. 2006).

While the question of whether the taking of property is necessary is a legislative question which the courts should not disturb absent fraud or abuse of discretion, the question of whether there is a public use is a judicial question without regard to legislative assertions that the use is public; thus, a trial court did not err when it determined whether a landowner's property was in fact taken for a contemplated public use without giving discretion to the city legislature's determination of public necessity. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 1994 Miss. LEXIS 548 (Miss. 1994).

A trial court did not err by determining that the condemnor city, rather than the landowner, had the burden of proving that the landowner's property was being taken for a public use, even though the city legislature had made a determination of public necessity. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 1994 Miss. LEXIS 548 (Miss. 1994).

The evidence was sufficient to support a trial court's dismissal of a city's condem-

nation petition based on a finding of no public use where the city's contract with a gaming corporation for use of the land for the alleged purpose of urban renewal did not comply with § 43-35-19(b)'s competitive bidding requirement, and the city failed to provide conditions, restrictions, or covenants in its contract with the gaming corporation to ensure that the property would be used for the purpose of gaming enterprise or other related establishments. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940, 1994 Miss. LEXIS 548 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking is not one for public use, the court cannot require the owners, who do not have the burden of proof on the issue of public use, to assume the burden of going forward with the evidence; to penalize owners for not doing so would be against the construction that the Supreme Court of Mississippi has stated must be placed on the eminent domain statutes. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking was not one for public use, the condemnor failed to meet its burden of proof where the primary purpose of the taking was to sell the property to another private party who would develop it and the incidental purpose was to remove slum and blighted conditions in the area, and therefore an evidentiary hearing would be necessary to determine whether the use to which the land would be put had a primarily public purpose. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking was not one for public use, the

mandate of Article 3, § 17 of the Mississippi Constitution that the question of public use be decided as a judicial, not a legislative, question was not complied with where there was merely a legislative assertion of public use but no evidence that the use would in fact be public. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

A circuit court erred in reducing the acreage of a railroad right-of-way sought to be condemned by the State for a penitentiary based on its finding that the State had shown no need for more than a short stretch of the right-of-way where the circuit court found neither fraud nor clear abuse of discretion. *Governor's Office of General Services v. Carter*, 573 So. 2d 736, 1990 Miss. LEXIS 839 (Miss. 1990).

Under § 11-27-15, the Special Court of Eminent Domain has the power to dismiss condemnation proceedings for certain reasons, particularly if the court finds that there is no public necessity for the taking or that the use alleged to be a public use is not in law a public use for which private property may be taken; accordingly, where the Court found that no Mississippi customer would be served by a high voltage transmission line, and where the primary purpose of that line was for interstate sales, the trial judge properly dismissed a condemnation petition on the basis that there was no public necessity for the taking of the particular property or part thereof. *Mississippi Power & Light Co. v. Conerly*, 460 So. 2d 107, 1984 Miss. LEXIS 2080 (Miss. 1984).

2. Appeals.

An appeal may be taken immediately from a ruling on a motion to dismiss an eminent domain petition. *Winters v. City of Columbus*, 735 So. 2d 1104, 1999 Miss. App. LEXIS 142 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

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Construction and application of rule requiring public use for which property is

condemned to be "more necessary" or "higher use" than public use to which property is already appropriated—state

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Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 715, 716 et seq.

CJS.

29A C.J.S., Eminent Domain §§ 571, 572 et seq.

Law Reviews.

1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 11-27-17. Oath of jurors.

When the jury shall be so impaneled, the jurors shall be sworn as follows: "I do solemnly swear or affirm that as a member of this jury I will discharge my duty honestly and faithfully, to the best of my ability, and that I will a true verdict render according to the evidence, without fear, favor, or affection, and that I will be governed by the instructions of the court. So help me God."

HISTORY: Codes, 1942, § 2749-09; Laws, 1971, ch. 520, § 9, eff from and after January 1, 1972.

Cross References — Impaneling of jury, see § 11-27-13.

Oath of petit jurors, see § 13-5-71.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

§ 11-27-19. Evidence of value; award and interest.

Evidence may be introduced by either party, and the jury may, in the sound discretion of the judge, go to the premises, under the charge of the court as to conduct, conversation and actions as may be proper in the premises. Evidence of fair market value shall be established as of the date of the filing of the complaint. Any judgment finally entered in payment for property to be taken shall provide legal interest on the award of the jury from the date of the filing of the complaint until payment is actually made; provided, however, that interest need not be paid on any funds deposited by the plaintiff and withdrawn by the defendants prior to judgment. At the conclusion of the trial, the court shall instruct the jury in accordance with the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1942, § 2749-10; Laws, 1971, ch. 520, § 10; Laws, 1991, ch. 573, § 65, eff from and after July 1, 1991.

Cross References — Jury viewing the place in question, see § 13-5-91.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.

3. Evidence of damages in general.
4. Specific items of damages.
5. Value of land.
6. —Value for particular purpose.

7. Burden of proof.
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1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the date a law firm improperly filed a lis pendens. *Lehman v. Miss. Transp. Comm'n*, 127 So. 3d 277, 2013 Miss. App. LEXIS 363 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

In a condemnation proceeding, the trial court erred when it compounded the interest and made a distinction between pre- and post-judgment interest because the eminent domain statutory scheme provided a specific provision for interest in Miss. Code Ann. § 11-27-19, and eminent domain judgments were not based on notes, accounts, sales or contracts; therefore, Miss. Code Ann. § 75-17-1(1) and Miss. Code Ann. § 75-17-7 did not apply to eminent domain judgments, and also “legal interest” was simple interest, not compounded interest. *Dedeaux Util. Co. v. City of Gulfport*, 938 So. 2d 838, 2006 Miss. LEXIS 529 (Miss. 2006).

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. *Dear v. Madison County by & Through Madison County Bd. of Supervisors*, 649 So. 2d 1260, 1995 Miss. LEXIS 32 (Miss. 1995).

A trial judge in an eminent domain proceeding erred in excluding the landowners’ evidence of appraised value and comparable sales of residential lots within the city limits which were zoned the same as the condemned property and which the landowners contended supported a viable valuation of their land based upon development of their property into lots for single-family residences, the use for which the property had been restricted through zoning by the municipality, and that error was exacerbated by the judge’s admission into evidence of only the municipality’s valuation of the landowners’ property which was dependent for support upon

distant sales of land that were zoned agricultural rather than residential. *Dennis v. City Council of Greenville*, 646 So. 2d 1290, 1994 Miss. LEXIS 573 (Miss. 1994).

Although the method of valuation for ad valorem tax purposes does not mirror the eminent domain concept of fair market value, some of the same factors are used in the different methods of valuation, and therefore tax appraisals are admissible to impeach the government’s appraisers in an eminent domain action where the assessed valuation is related to market value. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

A court did not err in refusing to allow the landowners to call the court-appointed expert appraiser as a witness in an eminent domain trial. *State Highway Com. v. Hayes*, 541 So. 2d 1023, 1989 Miss. LEXIS 182 (Miss. 1989).

In an eminent domain proceeding arising from the condemnation of land for the purpose of widening a highway, the highway department counsel’s repeated statements in closing argument that the jurors were citizens and taxpayers and the highway department was working for them were for the purpose of inflaming the minds of the jurors and constituted reversible error. *Dykes v. State Highway Com.*, 535 So. 2d 1349, 1988 Miss. LEXIS 572 (Miss. 1988).

Aesthetic value per se is not compensable in an eminent domain proceeding. Aesthetics enter into such a proceeding only insofar as they affect the fair market value of property. Thus, no independent damages were payable as a result of the destruction of oak trees on residential property, although a beautiful frontage of lined oak trees could affect the fair market value of residential property. *Mississippi State Highway Com. v. Viverette*, 529 So. 2d 896, 1988 Miss. LEXIS 321 (Miss. 1988).

In an eminent domain case, a comparable sale, on which an expert witness purports to rely, after the date of the taking constitutes no per se basis for objection to its admissibility in evidence or to the valuation expert relying on it and forming his opinion of value, so long as the valuation opinion ultimately given re-

flects the value of the property on the date of the taking. Competent appraisal and valuation experts should be expected to use and adjust both before and after comparable sales so that they form a reliable indication of value at the date of the taking. *Mississippi State Highway Com. v. Viverette*, 529 So. 2d 896, 1988 Miss. LEXIS 321 (Miss. 1988).

Courts should be particularly loath to disturb a jury's eminent domain award where the jury has personally viewed the premises. *Mississippi State Highway Com. v. Viverette*, 529 So. 2d 896, 1988 Miss. LEXIS 321 (Miss. 1988).

Mississippi recognizes before and after rule in determining measure of damages when part of tract of land is taken for public use, and while testimony as to comparable land sales is admissible in establishing fair market value of condemned property, it is error to allow jury to consider evidence of sales of non-comparable property; appraisers for landowner failed to establish probability that subject land would either be used within reasonable time for commercial purposes, or that there was demand for such property for those purposes. *State Highway Com. v. Smith*, 511 So. 2d 881, 1987 Miss. LEXIS 2494 (Miss. 1987).

Admission of testimony of landowner regarding loss of profits was reversible error due to uncertainty and speculation involved in future of any business; testimony of landowner regarding future profits was even more speculative because landowner did not even have business located on property condemned on date of filing of application for special court of eminent domain. *State Highway Com. v. Smith*, 511 So. 2d 881, 1987 Miss. LEXIS 2494 (Miss. 1987).

Eminent domain award sustained where jury had personally viewed premises, court expressing view that any substantial evidence in record supporting jury's damage assessment would preclude reversal where such viewing had occurred. *State Highway Com. v. Havard*, 508 So. 2d 1099, 1987 Miss. LEXIS 2582 (Miss. 1987).

Fair market value of property taken and damage to remainder are components of due compensation; while such items as

noise attributable to increased traffic and increased proximity of highway to residents may not form distinct elements of damage, such matters may be considered in so far as they impair fair market value of property remaining after taking, and question of whether following taking it may be more difficult to maneuver automobile in and out is matter that may affect fair market value of the property remaining after taking. *State Highway Com. v. Havard*, 508 So. 2d 1099, 1987 Miss. LEXIS 2582 (Miss. 1987).

The Supreme Court is particularly loath to disturb a jury's condemnation award where the jury has personally viewed the property being taken. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

The just compensation in a partial land taking case is generally the value of the part taken plus all damages which the residue of the property suffers, including a diminution in the value of the remainder. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

There is no talismanic test which can mechanically be applied to determine whether one can give an opinion regarding value in an eminent domain proceeding; all that is necessary is that the witness establish his substantial familiarity with the fair market value of properties of the type in issue and a like familiarity with the property in issue. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

Sale of leasehold interest in a sawmill which had 20 years to run with an option to renew for an additional 20 years could be considered as a comparable sale in a proceeding to take sawmill property. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

A partial taking which rendered the remainder unsuitable for continued use as a sawmill, the property's highest and best use, represented a loss bearing significantly on the owner's due compensation. *Anderson v. Guy*, 488 So. 2d 782, 1986 Miss. LEXIS 3031 (Miss. 1986).

The condemnor has the burden of proving the value of the condemned property. *Ellis v. Mississippi State Highway Com.*, 487 So. 2d 1339, 1986 Miss. LEXIS 2456 (Miss. 1986).

While transactions regarding the property to be taken—whether sales or secured transactions—may be the subject of testimony in condemnation proceedings, such testimony may be given only by one having proper knowledge and after proper foundation has been laid. *Ellis v. Mississippi State Highway Com.*, 487 So. 2d 1339, 1986 Miss. LEXIS 2456 (Miss. 1986).

Trial judge may refuse to admit videotape depicting property involved in eminent domain proceedings where jury has had actual viewing of premises. *Trustees of Wade Baptist Church v. Mississippi State Highway Com.*, 469 So. 2d 1241, 1985 Miss. LEXIS 2094 (Miss. 1985).

Neither access to property remaining after taking for public road nor parking on property are attributes or capabilities of land subject to separate valuation in eminent domain proceedings; they may be considered only insofar as they affect value of property remaining after taking. *Trustees of Wade Baptist Church v. Mississippi State Highway Com.*, 469 So. 2d 1241, 1985 Miss. LEXIS 2094 (Miss. 1985).

In an eminent domain proceeding, Miss Code § 11-27-19 was the proper statute applicable for the jury to view the premises. *Smith v. Mississippi State Highway Com.*, 423 So. 2d 808, 1982 Miss. LEXIS 2375 (Miss. 1982).

It is ordinarily wise to afford the property owner a jury view in eminent domain cases and inconvenience alone must be regarded as an insubstantial reason for refusing a view. *Barrett v. State Highway Com.*, 385 So. 2d 627, 1980 Miss. LEXIS 2031 (Miss. 1980).

Under the quick-take law (Code 1972, §§ 11-27-81 through 11-27-91), the defendants have the absolute right to withdraw the funds deposited by the petitioner subject only to the order of the court as to their distribution, and the petitioner has no further control of the funds and no right to withdraw them after they are deposited; under these circumstances, the petitioner should not and is not required to pay interest on the amount deposited after the date of its deposit. *Mississippi State Highway Com. v. Owen*, 310 So. 2d 920, 1975 Miss. LEXIS 1923 (Miss. 1975).

In arriving at fair market value of entire tract before taking, evidence of the reproduction cost of buildings on the property taken is admissible as a factor to be considered by the jury in arriving at a fair market value; although whether testimony relative to the reproduction cost is admissible in a given case lies largely in the sound discretion of the trial judge, such testimony is always admissible when it is established that the improvements are reasonably adapted to the land and the depreciated value of the improvement adds to the value of the entire property by the amount of their depreciated value; when such testimony is admitted, the condemnor is entitled to an instruction that such testimony is not evidence of market value but only a factor to be considered along with the other testimony in arriving at a fair market value. *Mississippi State Highway Com. v. Owen*, 308 So. 2d 228, 1975 Miss. LEXIS 1854 (Miss. 1975).

In the absence of a provision for a setoff of rental income against the interest earned on a judgment, the owner of property being condemned who derives income from the property after the petition is filed is not required to reduce the interest by the amount collected. *Redevelopment Authority of Meridian v. Holsomback*, 291 So. 2d 712, 1974 Miss. LEXIS 1737 (Miss. 1974).

2. Constitutionality.

Provision fixing the applicable date for determining due compensation in an eminent domain proceeding as the date that the complaint was filed rather than the date the property was transferred, Miss. Code Ann. § 11-27-19, was unconstitutional as applied to a private utility that provided service for eight more years after its public takeover began. *Dedeaux Util. Co. v. City of Gulfport*, 63 So. 3d 514, 2011 Miss. LEXIS 191 (Miss. 2011).

3. Evidence of damages in general.

It was not error for the special court to preclude testimony on damages to an owner's remaining property based on loss of access because the owner did not have the right of access along a sight flare in the before condition; if there was no change in the access, there could be no compensa-

tion for damages regarding loss of access, and the owner retained access along a road and along the highway outside of the sight flare. *Gateway United Methodist Church v. Miss. Transp. Comm'n*, 147 So. 3d 900, 2014 Miss. App. LEXIS 523 (Miss. Ct. App. 2014).

Special court of eminent domain did not abuse its discretion in disallowing testimony on damages to the remainder of an owner's for the taking of access along a highway by the Mississippi Transportation Commission (MTC) because the right of MTC to regulate entrances into the highway under the police power was well established and not a compensable taking. *Gateway United Methodist Church v. Miss. Transp. Comm'n*, 147 So. 3d 900, 2014 Miss. App. LEXIS 523 (Miss. Ct. App. 2014).

A judgment in an eminent domain proceeding would be reversed and remanded where the only evidence of fair market value presented by the county was a two year old appraisal and the appraiser testified that her outdated figures pertaining to value could not possibly have accurately reflected the value of the property on the critical date. *Williamson v. Lowndes County*, 723 So. 2d 1231, 1998 Miss. App. LEXIS 950 (Miss. Ct. App. 1998).

Although no error was committed in permitting one of the condemnees to testify as to the before and after value of property, a portion of which was sought to be condemned, the fact that the witness admitted that she did not have "any reasonable basis" for her opinion rendered her testimony valueless insofar as the determination of damages was concerned. *Murray v. Borden Co.*, 186 So. 2d 238, 1966 Miss. LEXIS 1301 (Miss. 1966).

It was reversible error to admit, in an action for the acquisition of a highway right of way, testimony that the United States government was paying 90 percent of the cost of the project. *Mississippi State Highway Com. v. Nixon*, 253 Miss. 636, 178 So. 2d 680, 1965 Miss. LEXIS 1022 (Miss. 1965).

A judgment awarding damages in an eminent domain proceeding will be reversed where as a whole so much incompetent, irrelevant, and immaterial evi-

dence was admitted on behalf of the landowner, having nothing to do with the value of the property to be taken and introduced solely for the purpose of prejudicing the jury and over the objection of the condemnor, that there could not have been a fair trial. *Mississippi State Highway Com. v. Deavours*, 251 Miss. 552, 170 So. 2d 639, 1965 Miss. LEXIS 882 (Miss. 1965).

In an eminent domain proceeding by the state highway department for the condemnation and appropriation of landowner's home place where the evidence as to the value of the land taken was in conflict, an award, based on a jury verdict, in favor of the landlord was affirmed by an equally divided vote of the justices. *Mississippi State Highway Com. v. Gabbert*, 238 Miss. 687, 119 So. 2d 774, 1960 Miss. LEXIS 458 (Miss. 1960).

In an appeal from the award of damages by a special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court correctly instructed for the county that the jury in arriving at its verdict should not consider any elements of inconvenience or other elements which were speculative and remote. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612, 1957 Miss. LEXIS 432 (Miss. 1957).

No verdict for larger sum than amount of damage to owners for land taken as estimated by witnesses for owner who properly qualifies their testimony by the before and after value should be permitted to stand. *Mississippi State Highway Com. v. Burwell*, 206 Miss. 490, 39 So. 2d 497, 1949 Miss. LEXIS 275 (Miss.), modified, *In re Hart's Estate*, 206 Miss. 498, 40 So. 2d 263, 1949 Miss. LEXIS 277 (Miss. 1949).

Under unusual conditions where the before and after values test is inapplicable to the peculiar facts, the court will adopt a rule supported by reason, logic and common sense, designed to result, as far as may be humanly possible, in ascertainment of true, accurate damage suffered by property owner. *Baker v. Mississippi State Highway Com.*, 204 Miss. 166, 37 So. 2d 169, 1948 Miss. LEXIS 352 (Miss. 1948).

It was the province of the jury to fix damages from conflicting testimony in

condemnation proceedings by state highway commission. *Mississippi State Highway Com. v. Treas*, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

The formula or the rule of before and after taking must be construed in connection with the facts of the case the court is then considering and the particular questions there presented for decision. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

An instruction on the measure of damages in an eminent domain proceeding that it is the difference between the fair market value of the property before taking and the fair market value of what remained after the land was taken and a public road constructed, cannot be complained of by the parties to the proceeding because it failed to include the qualification that general benefits and injuries shared by the general public should not be considered, and that the market value of the land must be that immediately before and after the taking, since the landowner requested such instruction and the highway commission, seeking condemnation, was not harmed thereby where there was no evidence by the commission as to general benefits and no evidence by the landowner as to general injuries. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

Evidence of remote damage excluded. *Board of Levee Comm'rs v. Lee*, 85 Miss. 508, 37 So. 747, 1904 Miss. LEXIS 147 (Miss. 1904).

A judgment for damages for land taken and damaged will not be disturbed on the ground that it is excessive when under the evidence a judgment for a much larger sum might have been given. *Board of Levee Comm'rs v. Lee*, 85 Miss. 508, 37 So. 747, 1904 Miss. LEXIS 147 (Miss. 1904).

4. Specific items of damages.

Although there is a danger in admitting testimony as to specific items of damage in an eminent domain proceeding, in that it could result in the pyramiding of damages by the jury, such testimony is competent when related to the before and after value

rather than as a basis for a separate verdict, and in a proceeding involving the taking of a grocery store, testimony as to the cost of removing the stock of goods and store fixtures from the premises was admissible, as a consequence of the taking and as an element of damage. *Blackwelder v. Bryant*, 246 So. 2d 512, 1971 Miss. LEXIS 1400 (Miss. 1971).

In an eminent domain proceeding for a right of way for a public highway which ran diagonally through a 70-acre tract, used by the landowner principally for growing timber, where admittedly the existing fence was in bad condition, evidence concerning the alleged necessity of fencing each side of the right of way, its cost, and its bearing upon the after-taking value of the remaining land, was properly excluded. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612, 1957 Miss. LEXIS 432 (Miss. 1957).

In highway condemnation proceedings involving inconvenience to existing owner and in driving his cattle and stock over, and in going to and from a part of his farm across, the proposed highway, testimony as to the effect of such inconvenience as it affected the before and after market value of the remaining property, plus the value of the property actually taken, was in accordance with the correct rule. *Mississippi State Highway Com. v. Dodson*, 207 Miss. 229, 42 So. 2d 179, 1949 Miss. LEXIS 332 (Miss. 1949).

The fact that farm buildings would have to be moved or rebuilt in order to face a new highway as they had faced an old highway is not a proper element of damages. *Mississippi State Highway Com. v. Loper*, 33 So. 2d 288 (Miss. 1948).

While a witness in testifying as to damages for the taking of a strip of land which would divide the owner's property into two segments may take into consideration any necessary inconvenience that would probably be taken into consideration by a prospective purchaser, the witness may not place his estimate on the inconvenience to the present landowner. *Mississippi State Highway Com. v. Dodson*, 203 Miss. 10, 33 So. 2d 287, 1948 Miss. LEXIS 223 (Miss. 1948).

Landowner, in condemnation proceedings, cannot recover damages for specific

injuries to his remaining land, but evidence of such injuries is competent if, but not unless, such would affect the market value of the remaining land. *Mississippi State Highway Com. v. Treas*, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

Admitting evidence, in proceeding to condemn highway right of way, of specific injuries to remaining land, such as cost of rebuilding and removing barns and silo, digging new pools, and constructing three miles of fence, was not error where landowner was careful to connect the specific items of cost with, and have witnesses consider them only as bearing upon, market value of the remaining land. *Mississippi State Highway Com. v. Treas*, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

Question in condemnation proceeding of prior interest and rate thereof, as element of damage, should have been admitted to and passed upon by the jury, and the amount of the verdict constituted the total damage fixed by the jury, and the trial judge had no power to add thereto prior interest, nor to fix the rate thereof. *Mississippi State Highway Com. v. Treas*, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

Where the rule that the measure of damages in an eminent domain proceeding is the difference between the fair market value of the property before the taking and the fair market value after the taking, is applicable, the owner of the land cannot recover damages for specific injuries to the remaining land, although evidence of such injuries is competent if, but not unless, they would affect the market value of the remaining land. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

A witness testifying as to the market value of the land before the taking for the construction of a highway and the market value after the taking, should not have been permitted in arriving at the latter value to take into consideration specific items of injury to the remaining land and the expense incurred thereby as separate elements of damages. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850,

198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

Evidence by landowner in an eminent domain proceeding to condemn land for the construction of a highway that the State Highway Commission had been requested, but refused, to construct a passageway under the highway connecting the two separate portions of the landowner's property, and that if it had been constructed the damages would have been greatly reduced thereby, should not have been admitted, since the Commission was under no duty to construct such an underpass. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

In eminent domain, permitting jury to consider evidence of danger to cattle and people crossing highway in arriving at depreciation of value of farm, held error. *State Highway Com. v. Day*, 181 Miss. 708, 180 So. 794, 1938 Miss. LEXIS 111 (Miss. 1938).

In determining damages to a farm by the building of a railroad across it, proof that laborers would stop to look at the train, teams would run away, that livestock would likely be killed by running trains, and foreign grasses would scatter over the farm, are not to be considered as elements of damage. *Yazoo & M. V. R. Co. v. Jennings*, 90 Miss. 93, 43 So. 469, 1907 Miss. LEXIS 66 (Miss. 1907).

The opinions of witnesses as to what would be the yield in crops of the lands are inadmissible. *Board of Levee Comm'rs v. Hendricks*, 77 Miss. 483, 27 So. 613, 1899 Miss. LEXIS 86 (Miss. 1899).

5. Value of land.

Where the condemnees' appraiser, who had no knowledge of the value of the land prior to condemnation, was permitted to testify as to the value of the land, but the court held the testimony to be incompetent and instructed the jury to disregard it, and there was no reason to believe that the jury failed to heed the court's admonition, introduction of the testimony worked no prejudice to the condemnor. *Mississippi State Highway Com. v. Reeves*, 257 So. 2d 527, 1972 Miss. LEXIS 1466 (Miss. 1972).

In arriving at the before and after value in an eminent domain proceeding, a wit-

ness may testify as to any injuries which depreciate the value of the remaining land, provided that the witness connects such injuries with the before and after value and considers them not as a specific item of damage but as bearing on such market value. *Mississippi State Highway Com. v. McArn*, 246 So. 2d 512, 1971 Miss. LEXIS 1401 (Miss. 1971).

A jury verdict in excess of \$600 per acre for cut-over timber land was so excessive as to indicate that the jury was influenced by bias, passion or prejudice in arriving at such a valuation on property taken for highway right of way purposes. *Mississippi State Highway Com. v. Trammell*, 252 Miss. 413, 174 So. 2d 359, 1965 Miss. LEXIS 1113 (Miss. 1965).

The land with which the subject land is being compared does not have to be of the same size or acreage, or approximately so, if the other criteria essential to a fair comparison are present, for to hold otherwise would make it almost impossible to find a comparable tract of land for sale which could be used as a means of evaluating the fair market value or due compensation of the land to be taken. *Pearl River Valley Water Supply Dist. v. Wood*, 252 Miss. 580, 172 So. 2d 196, 1965 Miss. LEXIS 1131 (Miss. 1965).

Evidence of the price paid for condemned land in a sale prior to the proceeding in which the condemnation is sought, and especially evidence as to the purchase price paid by the condemnee, is admissible generally, at least where the sale is voluntary and is not too remote in point of time. *Mississippi State Highway Com. v. Hillcrest Farm, Inc.*, 252 Miss. 154, 171 So. 2d 491, 1965 Miss. LEXIS 1086 (Miss. 1965).

The cost of removing personal property from the premises condemned may be shown as bearing upon the question of value. *Mississippi State Highway Com. v. Rogers*, 242 Miss. 439, 136 So. 2d 216, 1961 Miss. LEXIS 581 (Miss. 1961).

The mere fact that \$15,000 had never been paid for a home in a community in which the condemned property was located was not evidence that the condemnee's property was not worth that amount. *Mississippi State Highway Com. v. Gabbert*, 238 Miss. 687, 119 So. 2d 774, 1960 Miss. LEXIS 458 (Miss. 1960).

In eminent domain actions the opinions of experts as to values are not to be passively received and blindly followed, but are to be weighed by the jury and judged in view of all of the testimony in the case and the jury's own general knowledge of affairs, and are to be given only such consideration as the jury may believe them entitled to receive. *Warren County v. Harris*, 211 Miss. 80, 50 So. 2d 918, 1951 Miss. LEXIS 333 (Miss. 1951).

In an eminent domain suit involving the taking by the county for highway purposes of a small strip of land, the jury is not required to accept the opinion evidence of an expert witness who testifies for the landowner of the county. *Warren County v. Harris*, 211 Miss. 80, 50 So. 2d 918, 1951 Miss. LEXIS 333 (Miss. 1951).

Damages of \$5,000 for a condemned highway right of way across middle of a farm for a distance of a mile and a half, consisting of 35.1 acres, was sustained by the evidence, where witnesses estimated the value of the land taken and the reduced value of that remaining at from \$2,000 to \$15,000, especially where jurors personally inspected and examined the land. *Mississippi State Highway Com. v. Treas*, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

In an eminent domain proceeding it is competent for a witness, familiar with the land sought to be taken, to testify about the crops which had been produced on it, its location, distance from transportation facilities, and the character of the soil, and therefrom to give his opinion of the value, although he is not an expert. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149, 1903 Miss. LEXIS 142 (Miss. 1903).

Deeds to neighboring lands are not admissible in evidence in condemnation proceedings. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149, 1903 Miss. LEXIS 142 (Miss. 1903).

Sales of neighboring lands of like quality as that sought to be condemned and prices actually paid, may be proved in condemnation proceedings in order to weaken opinions of value. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149, 1903 Miss. LEXIS 142 (Miss. 1903).

Opinion evidence of the value of the lands sought to be taken is admissible in

condemnation proceedings although no sales of neighboring lands have been made. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149, 1903 Miss. LEXIS 142 (Miss. 1903).

The selling cash value of lands should be awarded the owner and not its theoretical value as gathered from the opinion of witnesses. *Board of Levee Comm'rs v. Hendricks*, 77 Miss. 483, 27 So. 613, 1899 Miss. LEXIS 86 (Miss. 1899).

6. —Value for particular purpose.

It is reversible error to admit evidence of the adaptability of land to a particular purpose where no immediate need or prospect of its being used for such purpose was disclosed by the evidence. *Mississippi State Highway Com. v. Hall*, 252 Miss. 863, 174 So. 2d 488, 1965 Miss. LEXIS 1155 (Miss. 1965).

The testimony of an expert witness introduced on behalf of the landowner that property used exclusively for the growing of timber was worth \$715 per acre, exclusive of the timber, was so unreasonable that it was completely unbelievable and should have been excluded. *Mississippi State Highway Com. v. Ratcliffe*, 251 Miss. 785, 171 So. 2d 356, 1965 Miss. LEXIS 902 (Miss. 1965), *aff'd*, 187 So. 2d 304, 1966 Miss. LEXIS 1342 (Miss. 1966).

In eminent domain proceeding, adaptability of land for particular purpose is immaterial unless present market value is enhanced thereby. *State Highway Com. v. Brown*, 176 Miss. 23, 168 So. 277, 1936 Miss. LEXIS 122 (Miss. 1936).

Evidence of the value of the land as a steamboat landing is competent. *Board of Levee Comm'rs v. Lee*, 85 Miss. 508, 37 So. 747, 1904 Miss. LEXIS 147 (Miss. 1904).

7. Burden of proof.

In action by owner, or lessee, against State Highway Commission for damages to plaintiff's property and business resulting from raising of grade of highway adjoining plaintiff's property, burden is on plaintiff to show legal damage and extent thereof. *Baker v. Mississippi State Highway Com.*, 204 Miss. 166, 37 So. 2d 169, 1948 Miss. LEXIS 352 (Miss. 1948).

Burden of proof is on condemnor on issue of damages sustained by the taking.

Mississippi State Highway Com. v. Treas, 197 Miss. 670, 20 So. 2d 475, 1945 Miss. LEXIS 305 (Miss. 1945).

While providing that evidence may be introduced by either party, this section [Code 1942, § 2759] fails to fix the burden of proof; however, the party who has the burden of proof may be determined by considering which would succeed if no evidence was offered, and by examining what would be the effect of striking out of the record the allegations to be proved, the onus being on the party who, under such test, would fail. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

In an eminent domain proceeding by the state highway commission to condemn land for the construction of a state highway, the burden of proof on the question of damages was on the highway commission, and the court below did not err in refusing an instruction that the burden of proof was upon the landowner to establish by a preponderance of the evidence the damages sustained by the taking of the property for a public highway. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

On the question of burden of proof, in a case wherein the highway commission seeks to condemn land, the commission could not stop by simply showing what it wanted for a right of way without going into the question of damages to the landowner, and therefore it must make out its case before the landowner is called on to introduce evidence. *Mississippi State Highway Com. v. Hillman*, 189 Miss. 850, 198 So. 565, 1940 Miss. LEXIS 153 (Miss. 1940).

8. View of premises.

There was no problem with a jury instruction in an eminent domain matter where the jury was instructed that the land had already been taken under the so-called "quick take law," Miss. Code Ann. § 11-27-81 and the jury had viewed the property in accordance with Miss. Code Ann. § 11-27-19; the jury was to determine the value of the taking. *North Biloxi Dev. Co., L.L.C. v. Miss. Transp.*

Comm'n, 912 So. 2d 1118, 2005 Miss. App. LEXIS 750 (Miss. Ct. App. 2005).

A jury is not required to enter the subject property in order for a jury viewing to be sufficient. *Ford v. Destin Pipeline Co.*, 809 So. 2d 573, 2000 Miss. LEXIS 118 (Miss. 2000).

Under the facts of the case there was no abuse of discretion on the part of the trial court in permitting the jury to view the property. *Murray v. Borden Co.*, 186 So. 2d 238, 1966 Miss. LEXIS 1301 (Miss. 1966).

In an appeal from an award of damages by special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court's instruction, advising the jury that the purpose of the view was to enable it to have a more intelligent understanding of the land and the location of the proposed road,

was proper, where the jury was further advised to consider all the other evidence along with its observations. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612, 1957 Miss. LEXIS 432 (Miss. 1957).

Although following the award of damages for the taking of a right of way for a public highway through the landowner's tract in the special court of eminent domain, the county had proceeded to clear most of the right of way and cut the trees off it, in view of landowner's evidence that the timber which had been upon the right of way was the same as that upon the remainder of the landowner's tract, the district court did not err in permitting the jury to view and inspect the land. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612, 1957 Miss. LEXIS 432 (Miss. 1957).

RESEARCH REFERENCES

ALR.

Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit. 1 A.L.R.2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain. 3 A.L.R.2d 286.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property. 6 A.L.R.2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it. 7 A.L.R.2d 364.

Unaccepted offer for purchase or sale of real property as evidence of value. 7 A.L.R.2d 781.

Elements and measure of compensation in eminent domain for temporary use and occupancy. 7 A.L.R.2d 1297.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes. 16 A.L.R.2d 1113.

Liability of condemner in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 A.L.R.2d 1225.

Admissibility, in condemnation proceeding, of evidence as to price paid for prop-

erty during pendency of proceeding. 55 A.L.R.2d 781.

Admissibility, in condemnation proceeding, of evidence as to price paid on prior sale. 55 A.L.R.2d 791.

Right to open and close argument in trial of condemnation proceedings. 73 A.L.R.2d 618.

View by jury in condemnation proceedings. 77 A.L.R.2d 548.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property. 20 A.L.R.3d 1081.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding. 21 A.L.R.3d 936.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain. 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding. 58 A.L.R.3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking. 59 A.L.R.3d 488.

Eminent domain: Consideration of fact that landowner's remaining land will be

subject to special assessment in fixing severance damages. 59 A.L.R.3d 534.

Good will as element of damages for condemnation of property on which private business is conducted. 81 A.L.R.3d 198.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land-state cases. 95 A.L.R.3d 752.

Un sightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding. 97 A.L.R.3d 587.

Running of interest on judgment where both parties appeal. 11 A.L.R.4th 1099.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain. 21 A.L.R.4th 765.

Eminent domain: compensability of loss of view from owner's property-estate cases. 25 A.L.R.4th 671.

Eminent domain: compensability of loss of visibility of owner's property. 7 A.L.R.5th 113.

What law determines just compensation when licensee of Federal Power Commission exercises power of eminent domain in federal court under § 21 of Federal Power Act (16 USCS § 814). 51 A.L.R. Fed. 929.

Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding. 56 A.L.R. Fed. 477.

CJS.

29A C.J.S., Eminent Domain §§ 509 et seq.

Lawyers' Edition.

No preaward interest held due in straight condemnation proceedings. 81 L. Ed. 2d 201.

§ 11-27-21. Damage to remainder; determination.

In determining damages, if any, to the remainder if less than the whole of a defendant's interest in property is taken, nothing shall be deducted therefrom on account of the supposed benefits incident to the public use for which the petitioner seeks to acquire the property.

HISTORY: Codes, 1942, § 2749-11; Laws, 1971, ch. 520, § 11, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. *Dear v. Madison County by & Through Madison County Bd. of Supervisors*, 649 So. 2d 1260, 1995 Miss. LEXIS 32 (Miss. 1995).

Fair market value of property taken and damage to remainder are components of due compensation; while such items as

noise attributable to increased traffic and increased proximity of highway to residents may not form distinct elements of damage, such matters may be considered in so far as they impair fair market value of property remaining after taking, and question of whether following taking it may be more difficult to maneuver automobile in and out is matter that may affect fair market value of the property remaining after taking. *State Highway Com. v. Havard*, 508 So. 2d 1099, 1987 Miss. LEXIS 2582 (Miss. 1987).

RESEARCH REFERENCES

ALR.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking. 59 A.L.R.3d 488.

Eminent Domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages. 59 A.L.R.3d 534.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel

remaining after taking of other parcel. 59 A.L.R.4th 308.

Am. Jur.

26 Am. Jur. 2d, Eminent Domain §§ 322 et seq.

4 Am. Jur. Proof of Facts, Eminent Domain, Proof No. 1 (damages from taking of property in eminent domain).

CJS.

29A C.J.S., Eminent Domain §§ 227 et seq.

§ 11-27-23. Verdict.

In the trial of all cases provided for herein, nine (9) jurors may bring in a verdict as in other civil cases. The verdict of the jury shall be in the following form: "We, the jury, find that the defendant (naming him) will be damaged by the acquisition of his property for the public use, in the sum of _____ Dollars."

HISTORY: Codes, 1942, § 2749-12; Laws, 1971, ch. 520, § 12, eff from and after January 1, 1972.

Cross References — Nine jurors returning a verdict in civil cases, see § 13-5-93. Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Under this section, the only issue for a jury to determine in an eminent domain proceeding is the amount the owner will be damaged by the acquisition of his property for the public use. If damage to other property of the owner occurs during construction on the property taken for public use, such damage is the subject matter of a separate lawsuit. *Berry v. United Gas Pipe Line Co.*, 370 So. 2d 235, 1979 Miss. LEXIS 2611 (Miss. 1979).

In an eminent domain proceeding a directed verdict against the owner of a leasehold interest and an instruction to the jury to find for the land owners alone were erroneous; the jury should have apportioned the damages reached in their single verdict between the lessee and the land owner. *Seago Enterprises, Inc. v. Mississippi State Highway Com.*, 330 So. 2d 588, 1976 Miss. LEXIS 1862 (Miss. 1976).

§ 11-27-25. Judgment.

Upon the return of the verdict, the court shall enter a judgment as follows, viz: "In this case the claim of (naming him or them) to have condemned certain lands named in the complaint, to-wit: (here describe the property), being the property of (here name the owner), was submitted to a jury composed of (here insert their names) on the _____ day of _____, A. D., _____, and the

jury returned a verdict fixing said defendant's compensation and damages at _____ Dollars, and the verdict was received and entered. Now, upon payment of the said award, with legal interest from the date of the filing of the complaint, ownership of the said property shall be vested in plaintiff and it may be appropriated to the public use as prayed for in the complaint. Let the plaintiff pay the costs, for which execution may issue."

HISTORY: Codes, 1942, § 2749-13; Laws, 1971, ch. 520, § 13; Laws, 1991, ch. 573, § 66, eff from and after July 1, 1991.

Cross References — Extension of term and jurisdiction of court of eminent domain after filing of judgment, see § 11-27-29.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

A default judgment should not be allowed a condemnor on his statement of values, but the question of value should have been submitted to the jury by way of a writ of inquiry. *Coleman v. Mississippi State Highway Com.*, 289 So. 2d 918, 1974 Miss. LEXIS 1693 (Miss. 1974).

By condemnation proceedings against the holder of a tax title to the land in question, the state highway commission acquired such holder's interest therein together with the right to acquire full ownership therein as against the original owner after an occupancy of three years. *Baldwin v. Mississippi State Highway*

Dep't, 187 Miss. 642, 193 So. 789, 1940 Miss. LEXIS 243 (Miss. 1940).

Where the state highway commission condemned a strip of land for highway purposes as against the holder of a tax title thereto, and it went into possession and occupied the same for more than three years, such period of possession without challenge on the part of the original owner destroyed the owner's right to challenge the commission's ownership, notwithstanding that the tax sale was void. *Baldwin v. Mississippi State Highway Dep't*, 187 Miss. 642, 193 So. 789, 1940 Miss. LEXIS 243 (Miss. 1940).

RESEARCH REFERENCES

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 547 et seq.

CJS.

29A C.J.S., Eminent Domain §§ 506 et seq.

§ 11-27-27. Transfer of title; payment and deposits previously made.

Upon return of the verdict and entry of the judgment, the applicant shall pay to defendants, or to the clerk if defendants absent themselves, the differences between the judgment and deposits previously made, if any; shall pay the costs of court, including the cost of jury service as is otherwise provided by law for the court in which the case is tried. Then, ownership of the property described in the petition shall be vested in petitioner and it may use said property as specified in the petition. If deposits perviously made exceed the judgement, then the clerk or defendant to whom disbursement thereof has been made, as the case may be, shall pay such excess to the petitioner.

HISTORY: Codes, 1942, § 2749-14; Laws, 1971, ch. 520, § 14, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.

1. In general.

The fee schedule in § 25-7-13 applies to actions in eminent domain, and funds handled by the clerk in such actions are monies subject to the commission as authorized under § 25-7-13(5). Pursuant to this section, the commission awarded to the clerk may not exceed $\frac{1}{2}$ of one percent; however, the amount of the commission is to be determined by the court. In fixing the clerk's commission, the court should exercise its discretion in light of the responsibility assumed and services rendered by the clerk. The commission paid to the clerk should be paid by the condemning authority since assessment of a fee or commission may not be used to diminish the compensation received by the landowner. *Mississippi State Highway Com. v. Herban*, 522 So. 2d 210, 1988 Miss. LEXIS 62 (Miss. 1988).

The court in the second trial of an eminent domain action erred in refusing to enter a judgment in favor of the state highway commission in the sum of \$1,200 where, after the first trial, the Commission had paid into the registry of the court the judgment amount of \$3,500, which was disbursed by the clerk to the landowners, but where the second trial, following a reversal on appeal of the first judgment, had resulted in a verdict of only \$2,300 in favor of the landowners. *Cox v. Mississippi State Highway Com.*, 386 So. 2d 1107, 1980 Miss. LEXIS 2061 (Miss. 1980).

The amount of the money judgment awarded by a court of eminent domain for the taking of a right-of-way across 80 acres of land was correctly paid to the circuit clerk where the owners of tent-twelfths interest in the condemned property were parties to the action, but owners of the remaining two-twelfths interest were unaccounted for and were not parties to the action. *Evans v. Mississippi Power Co.*, 206 So. 2d 321, 1968 Miss. LEXIS 1561 (Miss. 1968).

Where the state highway commission condemned a strip of land for highway purposes as against the holder of a tax title thereto, and it went into possession and occupied the same for more than three years, such period of possession without challenge on the part of the original owner destroyed the owner's right to challenge the commission's ownership, notwithstanding that the tax sale was void. *Baldwin v. Mississippi State Highway Dep't*, 187 Miss. 642, 193 So. 789, 1940 Miss. LEXIS 243 (Miss. 1940).

Under Code 1892 §§ 1693 and 1696, where, after the applicant had taken an appeal, it deposited the amount of the award in court and took possession of the land, it waived its right to the appeal. *Helm & N. W. R. Co. v. Turner*, 89 Miss. 334, 42 So. 377, 1906 Miss. LEXIS 39 (Miss. 1906).

Whether a mortgagee is a proper party to a condemnation proceeding, payment by a levee board to the mortgagor for land condemned, with knowledge of the mortgage, will not preclude recovery by the mortgagee. *Board of Mississippi Levee Comm'rs v. Wiborn*, 74 Miss. 396, 20 So. 861, 1896 Miss. LEXIS 118 (Miss. 1896).

RESEARCH REFERENCES

ALR.

Condemner's waiver, surrender, or limitation, after award, of rights or part of

property acquired by condemnation. 5 A.L.R.2d 724.

Charging landowner with rent or use

value of land where he remains in possession after condemnation. 20 A.L.R.3d 1164.

§ 11-27-29. Appeals.

(1) Every party shall have the right to appeal directly to the Supreme Court from the judgment entered in the special court of eminent domain, whether tried in county court or circuit court, by giving notice within ten (10) days from the date of the judgment or final order entered by the court to the court reporter to transcribe the record as taken and by prepaying all costs that may be adjudged against him; and said notice to the court reporter shall be given and the costs shall be paid as is otherwise required by law for appeals to the Supreme Court. If the judgment be in excess of the sum, if any, deposited, and the plaintiff, other than the State of Mississippi or any political subdivision thereof, desires an appeal, he shall deposit a sum, or a good and sufficient surety bond with a surety company authorized to do business in the State of Mississippi acceptable to the clerk, equal to double the amount of the judgment, less the amount of the deposit, if any, which shall be held exclusively to secure all damages assessed against plaintiff. In any case where the deposit exceeds the compensation to be paid the defendants as determined by the final judgment, the excess shall be returned to the plaintiff. If the appeal is by the defendant, it shall not operate as a supersedeas, nor shall the right of the plaintiff to enter in and upon the land and to appropriate the same to public use be delayed. If the appeal be by the State of Mississippi or any political subdivision thereof, no bond or prepayment of costs shall be required, except the Supreme Court filing fee as required by Section 25-7-3.

(2) The term of a special court of eminent domain shall begin when the court is convened as provided by statute and shall continue for ten (10) days immediately following the entry and filing of a judgement or final order with the clerk of the court, and thereafter the court shall have jurisdiction to dispose of any post trial motions or proceedings filed within said ten (10) days. The jurisdiction of a special court of eminent domain shall expire upon the entry and filing with the clerk of a final judgment or order disposing of any post trial motions or proceedings.

HISTORY: Codes, 1942, § 2749-15; Laws, 1971, ch. 520, § 15; Laws, 1978, ch. 335, § 8; Laws, 1980, ch. 366; Laws, 1991, ch. 573, § 67, eff from and after July 1, 1991.

Editor's Notes — Laws of 1978, ch. 335, § 40, provides as follows:

"SECTION 40. The provisions of this act shall not apply to any case wherein a petition for appeal has been presented prior to the day this act takes effect, and such appeals shall proceed to final determination with costs collected as though these statutes relating to costs had not been amended, but the provisions hereof shall apply to all other cases then pending and hereafter filed."

Cross References — Court of eminent domain, see § 11-27-3.

Judgment of court of eminent domain, see § 11-27-25.

Appeal to circuit court from board of supervisors or municipal authorities, see

§ 11-51-75.

Appeals from the county court, see § 11-51-79.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Courts should be particularly loath to disturb a jury's eminent domain award where the jury has personally viewed the premises. *Mississippi State Highway Com. v. Viverette*, 529 So. 2d 896, 1988 Miss. LEXIS 321 (Miss. 1988).

Where the appellant gave notice to the court reporter to transcribe the record within 10 days from the date of judgment pursuant to Code 1972, § 11-27-29, and a copy of the notice was filed with the clerk, as required by Code 1972, § 9-13-33, within the 45 days allowed by Code 1972, § 11-51-5, the notice was sufficient to perfect appellant's appeal. *Mississippi State Highway Com. v. Gresham*, 323 So. 2d 100, 1975 Miss. LEXIS 1559, 1975 Miss. LEXIS 1560 (Miss. 1975).

Where the special court of eminent domain was convened during a regular term of the county court and had only one case to try, the term of the special court ended

when the final judgment in that case was entered, and the court did not have jurisdiction to hear and determine a motion for a new trial filed after the date of judgment; The motion for a new trial, therefore, did not toll the statute of limitations, which began running on the date the final judgment was entered. *Mississippi State Highway Com. v. First Methodist Church, Inc.*, 323 So. 2d 92, 1975 Miss. LEXIS 1556 (Miss. 1975).

Due compensation requirements of the United States and Mississippi constitutions did not prohibit taxing a landowner with appeal costs and damages pursuant to Code 1972, §§ 11-3-23 and 11-27-29 where he appealed from a judgment in a special court of eminent domain and was not successful in having the award increased. *Antley v. Mississippi State Highway Com.*, 318 So. 2d 847, 1975 Miss. LEXIS 1452 (Miss. 1975).

RESEARCH REFERENCES

ALR.

Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal. 40 A.L.R.3d 203.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Am. Jur.

27 Am. Jur. 2d, Eminent Domain §§ 564 et seq.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-27-31. Property in more than one county.

In case the property sought to be condemned be in more than one (1) county, proceedings may be instituted in either of the counties in which a part of said property is situated.

HISTORY: Codes, 1942, § 2749-16; Laws, 1971, ch. 520, § 16, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am. Jur.

27 Am. Jur. 2d, Eminent Domain § 375.

§ 11-27-33. Certain takings of property excluded.

The provisions of this chapter shall not be applied to cases provided for by Section 233 of the Constitution, or to those cases covered under the provisions of Section 51-29-39, Mississippi Code of 1972.

HISTORY: Codes, 1942, § 2749-17; Laws, 1971, ch. 520, § 17, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

§ 11-27-35. Rights-of-way across railroads.

Telephone, telegraph or street railway companies, may acquire a right-of-way across railroads by condemnation by proceeding in accordance with the provisions of this chapter. If a right-of-way across a railroad has been condemned by a telegraph, telephone or street railway company, the railroad company shall be advised of the manner in which such telephone or telegraph company proposes to erect its poles and string its wires or place plant facilities underground, and in case of a street railway company, it shall give the railroad company notice of the manner in which it proposes to construct its tracks across the railroad, and if the railroad company shall object thereto, the public service commission shall have jurisdiction, upon complaint filed with it by the railroad company, to enter an order directing how the poles and wires or underground plant, if a telephone or telegraph company, shall be erected and strung or placed underground, and how tracks, if a street railway company, shall be constructed, and the railroad shall be crossed as ordered, and in no other manner.

HISTORY: Codes, 1942, § 2749-18; Laws, 1971, ch. 520, § 18, eff from and after January 1, 1972.

Cross References — Railroad rights of way, see § 77-9-169 et seq.
Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

A foreign telephone company may exercise the right of eminent domain in this

state. *Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. Co.*, 90 Miss. 686, 44 So. 166, 1907 Miss. LEXIS 115 (Miss. 1907).

RESEARCH REFERENCES

ALR.

Construction and application of rule re-

quiring public use for which property is condemned to be "more necessary" or

“higher use” than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration—For condemnation—By state agency—For state transportation facility).

§ 11-27-37. Right of action for expenses.

In case the plaintiff shall fail to pay the damages and costs awarded to the defendant within ninety (90) days from the date of the rendering of the final judgment, if such judgment is not appealed from, or in case the suit shall be dismissed by the plaintiff except pursuant to settlement, or the judgment be that the plaintiff is not entitled to a judgment condemning property, the defendant may recover of the plaintiff in an action brought therefor all reasonable expenses, including attorneys’ fees, incurred by him in defending the suit.

HISTORY: Codes, 1942, § 2749-19; Laws, 1971, ch. 520, § 19; Laws, 1978, ch. 335, § 9; Laws, 1991, ch. 573, § 68, eff from and after July 1, 1991.

Cross References — Application of amendment relating to prepayment of lower court costs and Supreme Court filing fee, see Editor’s Note to § 11-27-29.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Separate action.

1. In general.

Trial court erred by awarding a landowner attorney’s fees when the court dismissed a quick-take condemnation action because the court erred in dismissing the case. *Harrison County Util. Auth. v. Walker*, 143 So. 3d 608, 2014 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 386 (Miss. 2014).

Owner was not entitled to attorney fees under Miss. Code Ann. § 11-27-37 because he forfeited his principal stake in the disputed property in the eminent domain proceeding and had no right to the interest that accrued on it over the years or to attorney fees. *Morley v. Jackson Redevelopment Auth.*, 874 So. 2d 973, 2004 Miss. LEXIS 684 (Miss. 2004).

The trial court properly denied a claim for attorney and appraiser fees and punitive damages, notwithstanding the contention that the highway commission had not paid off a \$50,000 judgment in favor of plaintiffs within 90 days after it became final, where the commission did not know the exact amount of the judgment and damages until the issuance of a Supreme Court mandate and where it paid the amount mandated within 90 days. *Gresham v. Mississippi State Highway Com.*, 368 So. 2d 826, 1979 Miss. LEXIS 2236 (Miss. 1979).

The fact that landowners whose property is taken by eminent domain are not paid the expenses of defending the suit while such expenses are paid where, inter alia, the condemnation proceedings are abandoned by the condemnor or the judgment is that petitioner is not entitled to condemn the property does not render this section violative of equal protection where it makes provisions for entirely different situations. *Jackson Redevelopment Authority v. King, Inc.*, 364 So. 2d 1104, 1978 Miss. LEXIS 2236 (Miss. 1978).

The provision for recovery of expenses incurred in defending condemnation pro-

ceeding dismissed by plaintiff, embraces proceedings instituted by a municipality. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684, 1958 Miss. LEXIS 512 (Miss. 1958).

Under this section [Code 1942, § 2775], municipality which dismissed an eminent domain proceeding became liable for counsel and expert witness fees incurred by the landowner in preparation of a defense to the proceeding. *City of Jackson v. Lee*, 234 Miss. 502, 106 So. 2d 892, 1958 Miss. LEXIS 524 (Miss. 1958).

Where an oil company brought an action to obtain a right of way for a pipe line over owners' land, and owners instituted a proceeding resulting in a prohibition of the oil company from proceeding in a condemnation suit, the fact that pending the appeal the oil company had purchased rights of way and built its pipe line around the owners' lands did not render the question moot in view of the vital public issue of whether the oil company had a right to the taking, as well as the question of awarding damages to the landowners under this section [Code 1942, § 2775], and the fact that the oil company would be under permanent writ of prohibition in the absence of a final decision by the Supreme Court. *Ohio Oil Co. v. Fowler*,

232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

Where a landowner successfully obtains a writ of prohibition forever restraining the highway department from taking a parcel of land described in the original eminent domain proceedings, the fact that the application was amended and resulted in the taking of the same and additional land was immaterial, and the landowner could recover the additional cost of the proceedings under the provisions of this section [Code 1942, § 2775]. *Mississippi State Highway Com. v. Morgan*, 254 Miss. 630, 181 So. 2d 905, 1966 Miss. LEXIS 1561 (Miss. 1966).

Dismissal of suit by plaintiff may entitle defendant to damages. *Meridian & M. R. Co. v. Betbeze*, 111 Miss. 810, 72 So. 233, 1916 Miss. LEXIS 400 (Miss. 1916).

2. Separate action.

In a case seeking private road access, expenses were not awarded because the issue was not properly before the appellate court; a landowner had yet to bring a separate cause of action or a post-trial motion for expenses. *High v. Kuhn*, 191 So. 3d 113, 2016 Miss. LEXIS 121 (Miss. 2016).

RESEARCH REFERENCES

ALR.

Liability of condemnor in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 A.L.R.2d 1225.

Attorney's fees within statute imposing upon condemnor liability for "expenses," "costs," and the like. 26 A.L.R.2d 1295.

Cost to property owner of moving personal property as element of compensation in eminent domain. 69 A.L.R.2d 1453.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses. 68 A.L.R.3d 546.

What constitutes abandonment of eminent domain proceeding so as to charge condemnor with liability for condemnee's expenses or the like. 68 A.L.R.3d 610.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-27-39. Surveys; right to enter land; liability for damages.

Railroads, street or interurban railroads, mining, lighting, power, telephone, and telegraph corporations, and all other corporations, companies, persons and associations of persons, having rights and powers to condemn property may cause to be made such examinations and surveys for their

proposed railroads, lines and stations, as may be necessary to the selection of the most advantageous routes and sites, and for such purpose may, by their officers, agents and servants, enter upon the lands and waters of any person, but subject to liability for all damages done thereto.

HISTORY: Codes, 1942, § 2749-20; Laws, 1971, ch. 520, § 20, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Under this section [Code 1942, § 2776] a public utility may, in good faith, enter on property without the owner's knowledge or consent, for the purpose of making a preliminary examination and survey with a view to condemnation. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546, 1962 Miss. LEXIS 536 (Miss. 1962).

A public utility's right to enter on property for the purpose of examination and survey with a view to condemnation may be exercised by its independent contractor and his employee. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546, 1962 Miss. LEXIS 536 (Miss. 1962).

The right to damages recognized by this section [Code 1942, § 2776] does not embrace the statutory penalty recoverable for the cutting of trees. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546, 1962 Miss. LEXIS 536 (Miss. 1962).

Owner of land is not liable for the death of employee of State Highway Department, who entered under authority of this section and Code 1942, § 8023, irrespective of his negligence provided it did not amount to willful or wanton negligence since Code 1942 §§ 2776, 8023 merely divest the intruder from the penalties of a

trespasser and confer no greater rights than belong to a licensee. *Westmoreland v. Mississippi Power & Light Co.*, 172 F.2d 643, 1949 U.S. App. LEXIS 2755 (5th Cir. Miss. 1949).

Where a state highway employee, while operating a long drilling auger to test the subsoil of a proposed highway route across a cultivated field at a point in the right of way of an electric company, was electrocuted when the auger, on being lifted, came in contact with a high voltage wire thirteen and a half feet from the ground, neither the electric company, which, so far as shown, had knowledge of the presence of the highway employee, nor the representative of the state highway department, through whom he had been engaged, was liable for his death, this section [Code 1942, § 2776] divesting the intruder of the penalties and responsibilities of a trespasser by justifying his act, but not giving him any greater rights than those belonging to a licensee, and the duty of the owner of the land to guard against injury in such cases being governed by the rules applicable to trespassers. *Roberts v. Mississippi Power & Light Co.*, 193 Miss. 627, 10 So. 2d 542, 1942 Miss. LEXIS 152 (Miss. 1942).

RESEARCH REFERENCES

ALR.

Condemnor's acquisition of, or right to, minerals under land taken in eminent domain. 36 A.L.R.2d 1424.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs. 73 A.L.R.3d 1122.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold. 17 A.L.R.4th 337.

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, pe-

tition, or declaration – For condemnation
– By state agency – For state transportation facility).

§ 11-27-41. Takings by hydroelectric power companies.

All companies or associations of persons incorporated or organized for the purpose of improving and developing the water power of rivers and streams for generating, distributing and selling electricity and electro-mechanical power for any purpose for which electricity or electro-mechanical power is now or may hereafter be used or applied, are empowered and authorized to exercise the right of eminent domain, as provided in the chapter on that subject, to condemn and take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, and works, and the right-of-way through all lands between such reservoirs, ponds, dams and works and cities, towns and other points where light, heat or power may be consumed, to place and extend their electric wires and conductors, either underground or on poles overhead and to keep same in repair; provided that such wires and conductors shall be so constructed and placed as not to be dangerous to persons or property and to do as little injury as possible.

HISTORY: Codes, 1942, § 2749-21; Laws, 1971, ch. 520, § 21, eff from and after January 1, 1972.

Cross References — Definitions concerning public utilities, see § 21-27-11.

Grant of specific powers for rural electrification, see § 77-5-23.

Right of way over state lands in rural electrification cases, see § 77-5-47.

Eminent domain in electric power districts, see § 77-5-157.

Board of supervisors' use of eminent domain in county power development, see § 77-5-309.

Municipality condemnation proceedings, see § 77-5-441.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR.

Liability for overflow of water confined or diverted for public water power purposes. 91 A.L.R.3d 1065.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration – For condemnation – By state agency – For state transportation facility).

Am. Jur.

26 Am. Jur. 2d, Eminent Domain § 61.

§ 11-27-43. Erection and maintenance of utility poles and lines; duty of care owed to public.

(1) All companies or associations of persons incorporated or organized for the purposes set forth in Section 11-27-41 are authorized and empowered to erect, place and maintain their posts, wires and conductors along and across any of the public highways, streets or waters and along and across all turnpikes, railroads and canals, and also through any of the public lands, and

to do such clearing as may be reasonably necessary for the proper protection, operation and maintenance of such facilities, provided in all cases such authorization shall meet the requirements of the National Electrical Safety Code. The same shall be so constructed and placed as not to be dangerous to persons or property; nor interfere with the common use of such roads, streets, or waters; nor with the use of the wires of other wire-using companies; or more than is necessary with the convenience of any landowner.

(2) The duty of care owed to the public by owners and operators of public utility facilities located adjacent to a highway, road, street or bridge in this state is satisfied when:

(a) With respect to state highways, the public utility facilities comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(b) With respect to roads, streets and bridges that are not part of the state highway system, the public utility facilities located in a public right-of-way comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(c) With respect to roads, streets and bridges that are not part of the state highway system, the public utility facilities located on private property comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(d) With respect to structures, appurtenances, equipment or appliances whose placement or installation is not subject to the provisions of the National Electrical Safety Code, the public utility facilities comply with the provisions of the standards in effect when the structure, appurtenance, equipment or appliance is placed, installed or located adjacent to any highway, road, street or bridge in this state, whether or not a part of the state highway system.

(3)(a) The owner of a road, street, highway or bridge, which is not itself the owner or operator of a public utility, owes no duty to the public regarding or relating to the placement or location of public utility facilities within or appurtenant to the right-of-way of the road, street, highway or bridge.

(b) The owner of private property, which is not itself the owner or operator of a public utility, owes no duty to the public regarding or relating to the placement or location of public utility facilities on or appurtenant to the private property.

(4) For the purpose of this section, the term “public utility facilities” means pipes, mains, conduits, cables, wires, towers, poles and other structures, equipment or appliances, whether publicly or privately owned, installed or placed adjacent to any roadway by an owner or operator of a public utility facility.

HISTORY: Codes, 1942, § 2749-22; Laws, 1971, ch. 520, § 22; Laws, 2002, ch. 412, § 1, eff from and after July 1, 2002.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation cor-

rected an error in (4). The word “subsection” was changed to “section” so that “For the purpose of this subsection” reads as “For the purpose of this section.” The Joint Committee ratified this correction at its August 5, 2008, meeting.

Cross References — Municipalities’ granting rights for erection of posts and wires, see § 21-27-3.

Telegraph companies erecting lines, see § 77-9-711.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Power companies are not entitled or authorized to place a power line underground unless the customer agrees to pay for such. However, a power company may violate its duty of care under Miss. Code Ann. § 11-27-43 if it fails to place high voltage lines underground at its own expense where it is feasible and practical. *Ware v. Entergy Miss., Inc.*, 887 So. 2d 763, 2003 Miss. LEXIS 876 (Miss. 2003).

To satisfy the statute, power companies are required to make sure that: (1) National Electrical Safety Code (NESC) requirements are met, (2) the poles are constructed and placed so as not to be dangerous to persons or property, (3) there is no interference with the common use of such roads, streets, waters, or with the use of the wires of other wire-using companies, and (4) the construction does not unnecessarily inconvenience any landowner. *Ware v. Entergy Miss., Inc.*, 887 So. 2d 763, 2003 Miss. LEXIS 876 (Miss. 2003).

The statute places on a utility company the continuing duty to eliminate foreseeable danger, and that duty is not obviated by the failure of the injured party or another to exercise such care unless it is determined by the factfinder that the latter’s conduct was the sole proximate cause of the injury. *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721, 1998 Miss. LEXIS 68 (Miss. 1998).

In determining whether the placement of a pole may be considered unreasonably dangerous such that liability may follow, the trial court should consider such factors as the structure’s proximity to the roadway, the configuration of the roadway, whether the utility had notice of previous accidents of sufficient similarity to give reasonable notice of the danger, and whether there were feasible alternative

locations for the structure which were less dangerous; it will not be a bar to liability that contact with the structure occurred only after a driver, through misfortune or ordinary negligence, left the main traveled portion of the right of way. *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721, 1998 Miss. LEXIS 68 (Miss. 1998).

In an action brought by a house mover against an electric company for injuries he received from coming into contact with a live power line, an instruction for defendant that if jury believed the power line in question had been erected and maintained in conformity with Code 1942, § 2778 and National Electric Safety Code there would be no liability on defendant, was erroneous and misleading for the moving of a house along a highway is not “common use of the highway,” and instruction was also contrary to rule that whether utility is negligent despite compliance with National Electric Safety Code was a question for jury. *Crouch v. Mississippi Power & Light Co.*, 193 So. 2d 144, 1966 Miss. LEXIS 1283, 1967 Miss. LEXIS 1546 (Miss. 1966).

The policy of the state evidenced by this provision, is to encourage the development of public utilities by affording them the right to place their lines along streets and highways. *City Council of Greenville v. Thomas*, 241 Miss. 633, 131 So. 2d 659, 1961 Miss. LEXIS 382 (Miss. 1961).

A power company may, with the consent of the municipal authorities, place a transmission line upon property purchased for a park, not interfering with its use as such. *City Council of Greenville v. Thomas*, 241 Miss. 633, 131 So. 2d 659, 1961 Miss. LEXIS 382 (Miss. 1961).

Where a right of way was conveyed to the state highway commission for highway purposes, and electric power com-

pany constructed power lines on the highway right of way, the landowner could recover damages on the ground that private property should not be taken or damaged for public use except on due compensation. *Berry v. Southern Pine Electric Power Asso.*, 222 Miss. 260, 76 So. 2d 212, 1954 Miss. LEXIS 644 (Miss. 1954).

It is continuing duty of electric company to maintain wires over streets in manner not dangerous to persons and property. *Mississippi Power Co. v. Thomas*, 162 Miss. 734, 140 So. 227, 1932 Miss. LEXIS 167 (Miss. 1932).

Electric company maintaining wires over streets and highways must exercise highest degree of care to prevent danger.

Mississippi Power Co. v. Thomas, 162 Miss. 734, 140 So. 227, 1932 Miss. LEXIS 167 (Miss. 1932).

This section [Code 1942, § 2778] authorized power company to construct its poles and lines in and upon public highway. *Mississippi Power Co. v. Sellers*, 160 Miss. 512, 133 So. 594, 1931 Miss. LEXIS 160 (Miss. 1931).

Power company held not liable where trailer on truck in which plaintiff rode, as result of reckless driving, struck pole within right of way but eight feet from traveled road. *Mississippi Power Co. v. Sellers*, 160 Miss. 512, 133 So. 594, 1931 Miss. LEXIS 160 (Miss. 1931).

RESEARCH REFERENCES

ALR.

Construction and application of rule requiring public use for which property is condemned to be “more necessary” or “higher use” than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration – For condemnation – By state agency – For state transportation facility).

§ 11-27-45. Power lines across railroads.

All companies, or associations of persons incorporated or organized for the purposes set forth in Section 11-27-41 may acquire a right-of-way across railroads by condemnation by the exercise of such right of eminent domain. If a right-of-way across a railroad has been condemned by a hydroelectric company, as herein defined, the railroad company shall be advised of the manner in which said hydroelectric company proposes to erect its poles and string its wires and conductors, and if the railroad company shall object thereto, the public service commission shall have jurisdiction upon complaint filed with it by the railroad company to enter an order directing how the poles, wires and conductors shall be constructed, and the railroad shall be crossed as ordered and in no other manner.

HISTORY: Codes, 1942, § 2749-23; Laws, 1971, ch. 520, § 23, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR.

Construction and application of rule requiring public use for which property is

condemned to be “more necessary” or “higher use” than public use to which property is already appropriated—state

takings. 49 A.L.R.5th 769.

§ 11-27-47. Pipelines.

All companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi, or natural gas districts, incorporated or organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas, including carbon dioxide or other gaseous substances for use in connection with secondary or tertiary recovery projects located within the state of Mississippi for the enhanced recovery of liquid or gaseous hydrocarbons, or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances, for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipelines and appliances along or across highways, waters, railroads, canals and public lands, above or below ground, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands.

The board of supervisors of any county through which any such line may pass shall have the power to regulate, within its respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county. All such companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof.

HISTORY: Codes, 1942, § 2749-24; Laws, 1971, ch. 520, § 24; Laws, 1984, ch 420, § 2, eff from and after passage (approved April 23, 1984).

Editor's Notes — Laws of 1984, ch. 420, § 1 provides as follows:

“SECTION 1. The Legislature hereby finds and declares the following:

(a) The State of Mississippi has substantial and valuable oil and gas reserves not producible by traditional recovery techniques, but which may be producible by enhanced recovery methods.

(b) It is for the public benefit and in the public interest that the maximum amount of the state's oil and gas reserves be produced to the extent that it is economically and technologically feasible.

(c) Mississippi has substantial and valuable carbon dioxide reserves.

(d) The enhanced recovery of oil and gas by the injection of carbon dioxide into oil and gas reservoirs is a promising enhanced recovery method which may result in the increased production of oil and gas in the State of Mississippi.

(e) It is for the public benefit and in the public interest that Mississippi's carbon dioxide be produced and used for the enhanced recovery of oil and gas.

(f) Pipelines are necessary to transport carbon dioxide from the place where it is produced to the place where it is used or consumed.

(g) Such pipelines will encourage production of carbon dioxide, a valuable natural

resource, and encourage the enhanced production of oil and gas, all of which will be to the benefit of the State of Mississippi and its citizens and will assist in meeting the energy needs of the state and Nation.

(h) The public convenience and necessity requires that companies and other entities needing and using pipelines for the purpose of conveying, distributing or transporting carbon dioxide be empowered to exercise the power of eminent domain for the purpose of constructing and maintaining such pipelines.”

Cross References — Pipes, conduits, and pipe lines, see § 21-27-5.

Laying of pipelines, see § 29-7-7.

Right of eminent domain for the purpose of constructing pipelines, see § 53-3-159.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Companies, associations, etc., as having power of eminent domain.
3. Exercise of power, generally.
4. Public lands.
5. Damages or compensation.

1. In general.

Dismissal of an eminent domain proceeding under Miss. Code Ann. § 11-27-15 was properly denied because owners were unable to show that an electric association's taking was not for public use, and any incidental benefit to surrounding landowners did not defeat the taking of the owners' property; the association wanted to construct a power line to supply its customers with adequate voltage. *Knight v. S. Miss. Elec. Power Ass'n*, 943 So. 2d 81, 2006 Miss. App. LEXIS 667 (Miss. Ct. App. 2006).

Although a pipeline company holding an easement across public lands had a valid property interest in such lands, its interest was subject to the statutory restriction that the lines not interfere with the state's dominion over the land for the public welfare; thus, the expense of lowering the pipeline when the state constructed a drainage canal over the easement was properly placed on the pipeline company. *State v. Michigan Wisconsin Pipeline Co.*, 360 So. 2d 684, 1978 Miss. LEXIS 2299 (Miss. 1978).

Involving the right, as against a utility having a municipal franchise, of an electric power association to serve a portion of its certificated area after annexation to a city. *Delta Electric Power Asso. v. Missis-*

sippi Power & Light Co., 250 Miss. 482, 149 So. 2d 504, 1963 Miss. LEXIS 537 (Miss.), cert. denied, 375 U.S. 77, 84 S. Ct. 196, 11 L. Ed. 2d 142, 1963 U.S. LEXIS 237 (U.S. 1963).

The policy of the state evidenced by this provision, is to encourage the development of public utilities by affording them the right to place their lines along streets and highways. *City Council of Greenville v. Thomas*, 241 Miss. 633, 131 So. 2d 659, 1961 Miss. LEXIS 382 (Miss. 1961).

This section [Code 1942, § 2780] does not require resort to condemnation proceedings where property owners or public authorities consent to use without compensation. *City Council of Greenville v. Thomas*, 241 Miss. 633, 131 So. 2d 659, 1961 Miss. LEXIS 382 (Miss. 1961).

The plain purpose of this section [Code 1942, § 2780] is to encourage pipe line enterprises, and the legislative intent must be sought in the light of that purpose. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

Where an oil company brought an action to obtain a right of way for a pipe line over owners' land and owners instituted a proceeding resulting in a prohibition of the oil company from proceeding in a condemnation suit, the fact that pending the appeal the oil company had purchased rights of way and built its pipe line around the owners' lands did not render the question moot in view of the vital public issue of whether the oil company had a right to the taking, as well as the question of awarding damages to the land owners under Code 1942, § 2775, and the fact that the oil company would be under per-

manent writ of prohibition in the absence of a final decision by the Supreme Court. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

Telephone and telegraph lines which pipe line company sought to construct for use in connection with pipe line held mere "appliances" within its charter and statute respecting eminent domain. *Gandy v. Public Service Corp.*, 163 Miss. 187, 140 So. 687, 1932 Miss. LEXIS 27 (Miss. 1932).

This section [Code 1942, § 2780], did not apply where power company placed poles along highway and truck struck pole. *Mississippi Power Co. v. Sellers*, 160 Miss. 512, 133 So. 594, 1931 Miss. LEXIS 160 (Miss. 1931).

2. Companies, associations, etc., as having power of eminent domain.

The word "distribution" as used in this section [Code 1942, § 2780] includes substantial and necessary steps in the total process of distribution and the construction of a pipe line to carry condensate from two producing fields to a refinery is a substantial and necessary step in the process of distributing the commodity transported by a common carrier. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

Since there is no state regulatory authority over pipe lines for the conveyance of oil and condensate, the common law definition of common carriers would apply. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

A company organized to transport condensate of oil by pipe lines is organized for public purpose for which private property may be condemned, provided that the facilities of the company are open to the public generally on equal terms; and the use is not rendered a private one by the fact that only a few persons will be served at the time the property is sought to be taken. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

The public necessity for taking private property is a legislative question a deter-

mination of which may be delegated in respect to abutting lands of individuals, damages by reason of any injury caused by the construction of the line or the use of the line, and contemplates damages resulting from the use of the line in the highway right of way and not the use of the highway right of way for the location of the line. *Mississippi Valley Gas Co. v. Boydstun*, 230 Miss. 11, 92 So. 2d 334, 1957 Miss. LEXIS 340 (Miss. 1957).

This section [Code 1942, § 2780] grants pipe line companies the right to condemn private property. *Gandy v. Public Service Corp.*, 163 Miss. 187, 140 So. 687, 1932 Miss. LEXIS 27 (Miss. 1932).

Corporation having power under charter of laying pipe lines to distribute gas for public purposes was "public utility corporation," and had right of eminent domain, whether it had valid franchise with city or not. *Gandy v. Public Service Corp.*, 163 Miss. 187, 140 So. 687, 1932 Miss. LEXIS 27 (Miss. 1932).

Legislature had constitutional authority to grant right of eminent domain to pipe lines for purpose of distributing gas to public. *Gandy v. Public Service Corp.*, 163 Miss. 187, 140 So. 687, 1932 Miss. LEXIS 27 (Miss. 1932).

3. Exercise of power, generally.

The effect of Code 1942, § 7716-05, is to make the obtaining of a certificate of public convenience and necessity by a utility a condition of its exercise of the power of eminent domain. *Mississippi Power & Light Co. v. Blake*, 236 Miss. 207, 109 So. 2d 657, 1959 Miss. LEXIS 310 (Miss. 1959).

That a cement plant will considerably benefit from extension of an electric power line does not make the taking of property for the line one for a private purpose, where there is evidence of public need for the extension. *Mississippi Power & Light Co. v. Blake*, 236 Miss. 207, 109 So. 2d 657, 1959 Miss. LEXIS 310 (Miss. 1959).

An oil company proposing to operate a common carrier pipe line for the conveyance of oil and condensate from two producing fields to a refinery which had contracted to purchase the company's entire production, whose facilities would be open to the public generally, particularly to all

owners of production within these fields, and had filed a tariff with the Interstate Commerce Commission, was authorized to condemn a right of way over land, notwithstanding that some 60 to 65 per cent of the oil to be conveyed was from the company's own wells. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128, 1956 Miss. LEXIS 647 (Miss. 1956).

That another company had laid pipe line over same territory did not prevent respondent from condemning land for pipe line, public policy of State, as evidenced by anti-trust statutes prohibiting municipalities from granting exclusive franchises, being to encourage competition. *Gandy v. Public Service Corp.*, 163 Miss. 187, 140 So. 687, 1932 Miss. LEXIS 27 (Miss. 1932).

4. Public lands.

Where a statute granted the right to build and construct a pipeline across public lands, the phrase public lands includes sixteenth section school lands. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184, 1954 Miss. LEXIS 569 (Miss. 1954).

The purpose which the legislature had in granting to public utilities the right to construct pipelines across sixteenth section lands is consistent with other analogous legislative grants. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184, 1954 Miss. LEXIS 569 (Miss. 1954).

5. Damages or compensation.

Even if a pipeline company and a property owner entered into an agreement whereby the company agreed that no other lines would be constructed across the owner's property, it would be void as against public policy and would not support the grant of a writ of prohibition to prevent the company from exercising its right of eminent domain to acquire a second easement across the same property. *Southern Pine Wood Preserving Co. v. Brown*, 202 So. 2d 916, 1967 Miss. LEXIS 1343 (Miss. 1967).

Whether a pipe line company is liable for the overturning of a negligently driven car striking a concrete post, installed as a marker, not readily visible, located on the

shoulder of a highway near the edge of a ditch, about 3 ½ feet from the blacktop, held for the jury. *United Gas Pipe Line Co. v. Jones*, 236 Miss. 471, 111 So. 2d 240, 1959 Miss. LEXIS 341 (Miss. 1959).

This section [Code 1942, § 2780] does not contemplate the right to recover rent for the use of the highway right of way in which a distribution line is located insofar as it applies to privately owned abutting lands, since the language "injury caused by such construction or use thereof" means, with respect to abutting lands of individuals, damages by reason of any injury caused by the construction of the line or the use of the line, and contemplates damages resulting from the use of the line in the highway right of way and not the use of the highway right of way for the location of the line. *Mississippi Valley Gas Co. v. Boydston*, 230 Miss. 11, 92 So. 2d 334, 1957 Miss. LEXIS 340 (Miss. 1957).

Where an abutting property owner's predecessor in title had conveyed a highway right of way to the State Highway Commission, and subsequently a gas company, pursuant to permission obtained from the State Highway Commission, laid a gas distribution line wholly within the right of way, the abutting property owner was not entitled to rent from the gas company, where his property was not damaged or depreciated in value by the use of the right of way for the distribution line; nor was there violation of the abutting property owner's rights under § 17 of the Mississippi Constitution. *Mississippi Valley Gas Co. v. Boydston*, 230 Miss. 11, 92 So. 2d 334, 1957 Miss. LEXIS 340 (Miss. 1957).

Where a right of way was conveyed to the state highway commission for highway purposes, and electric power company constructed power lines on the highway right of way, the landowner could recover damages on the ground that private property should not be taken or damaged for public use except on due compensation. *Berry v. Southern Pine Electric Power Asso.*, 222 Miss. 260, 76 So. 2d 212, 1954 Miss. LEXIS 644 (Miss. 1954).

A phrase "damages for any use" as used in this section [Code 1942, § 2780] includes compensation for reasonable rental

or use of right of way. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184, 1954 Miss. LEXIS 569 (Miss. 1954).

An uncompensated grant by the state of an easement or right of way across a

sixteenth section would be in violation of the constitution. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184, 1954 Miss. LEXIS 569 (Miss. 1954).

OPINIONS OF THE ATTORNEY GENERAL

A county has the authority to allow municipal use of the county's road right-of-way for construction and maintenance

of municipal water mains without the necessity of an interlocal agreement. *Bobo*, June 19, 1998, A.G. Op. #98-0254.

RESEARCH REFERENCES

ALR.

Eminent domain: Elements and measure of compensation for oil or gas pipeline through private property. 38 A.L.R.2d 788.

Eminent domain: cost of substitute facilities as measure of compensation to state or municipality for condemnation of public property. 40 A.L.R.3d 143.

Am. Jur.

26 Am. Jur. 2d, Eminent Domain § 84.

61 Am. Jur. 2d, Pipelines §§ 19 et seq.
9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration – For condemnation – By state agency – For state transportation facility).

Law Reviews.

1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 11-27-48. Information from Public Service Commission or Federal Energy Regulatory Commission.

No entity empowered under the laws of the State of Mississippi to exercise the power of eminent domain shall be required, as a condition precedent to exercising such power, to obtain from the applicable regulatory agency, whether the Mississippi Public Service Commission or the Federal Energy Regulatory Commission, or any successor agency, any of the following:

- (a) A determination that the entity qualifies as one to which the Legislature has granted the power of eminent domain;
- (b) A determination that the entity has complied with state law in invoking the statutory power of eminent domain; or
- (c) A certificate of public convenience and necessity for the particular taking in question.

However, this section shall not affect or alter in any way the terms and provisions contained in Sections 77-3-13, 77-3-17 and 77-3-21.

HISTORY: Laws, 1997, ch. 453, § 1; Laws, 2007, ch. 483, § 1, eff from and after July 1, 2007.

Cross References — Mississippi Public Service Commission, see § 77-1-1 et seq. Eminent domain proceedings, see Miss. R. Civ. P. 81.

§ 11-27-49. Public schools.

The boards of trustees of an agricultural high school, or agricultural high school and junior college, or any municipal separate school district, and the county board of education, in the case of other school districts, are authorized and empowered to exercise the right of eminent domain, for the purpose of acquiring property to be used for school and playground purposes. However, the rights of eminent domain created hereunder shall not be used for the condemnation of the property of any school or college whatsoever, either private, fraternal, sectarian or denominational.

HISTORY: Codes, 1942, § 2749-25; Laws, 1971, ch. 520, § 25, eff from and after January 1, 1972.

Cross References — Right of eminent domain relating to underground storage of natural gas, see § 53-3-159.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS**1. In general.**

The last sentence of this section [Code 1942, § 2749-25] is applicable only to prevent any enumerated school authority or school entity from taking land belonging to another school, and does not prohibit

the state highway commission from taking land belonging to a school board through eminent domain proceedings. *La Barreare v. Lambert*, 284 So. 2d 50, 1973 Miss. LEXIS 1246 (Miss. 1973).

RESEARCH REFERENCES**ALR.**

Amount of property which may be condemned for school. 71 A.L.R.2d 1071.

§ 11-27-51. Proceedings filed before 1972 not affected by chapter.

Nothing in this chapter shall be considered or construed to affect in any way any eminent domain proceeding filed before January 1, 1972 and such proceeding may be prosecuted to final conclusion according to the law in effect on the date such proceeding was filed, but the provisions of Section 11-27-29 relating to direct appeals to the supreme court shall apply to cases pending in any county court on January 1, 1972 wherein no appeal has been taken. Nothing in this chapter shall be construed or shall operate to negate, abridge or alter rights vested pursuant to any prior statutes repealed and reenacted hereby, or to affect judicial construction thereof.

HISTORY: Laws, 1971, ch. 520, § 27, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

RIGHT TO IMMEDIATE POSSESSION

Sec.

- 11-27-81. Who may exercise right of immediate possession.
- 11-27-83. Institution of proceedings; appraisal of property.
- 11-27-85. Order granting right to immediate title and immediate entry; deposit.
- 11-27-87. Effect of insufficiency or excess of deposit.
- 11-27-89. Compensation of appraiser; right to jury trial.
- 11-27-91. Special funds and accounts of highway commission.

§ 11-27-81. Who may exercise right of immediate possession.

The right of immediate possession pursuant to Sections 11-27-81 through 11-27-89, Mississippi Code of 1972, may be exercised only:

(a) By the State Highway Commission for the acquisition of highway rights-of-way only;

(b) By any county or municipality for the purpose of acquiring rights-of-way to connect existing roads and streets to highways constructed or to be constructed by the State Highway Commission;

(c) By any county or municipality for the purpose of acquiring rights-of-way for widening existing roads and streets of such county or municipality; provided, however, that said rights-of-way shall not displace a property owner from his dwelling or place of business;

(d) By the boards of supervisors of any county of this state for the acquisition of highway or road rights-of-way in connection with a state-aid project designated and approved in accordance with Sections 65-9-1 through 65-9-31, Mississippi Code of 1972;

(e) By any county, municipality or county utility authority created under the Mississippi Gulf Region Utility Act, Section 49-17-701 et seq., for the purpose of acquiring rights-of-way for water, sewer, drainage and other public utility purposes; provided, however, that such acquisition shall not displace a property owner from his dwelling or place of business. A county utility authority should prioritize utilizing easements within ten (10) feet of an existing right-of-way when economically feasible. A county utility authority may not exercise the right to immediate possession under this paragraph after July 1, 2013. Provisions of this paragraph (e) shall not apply to House District 109;

(f) By any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution;

(g) By the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 or any facility related to the project as provided in Section 57-75-11(e)(ii);

(h) By the boards of supervisors of any county of this state for the purpose of constructing dams or low-water control structures on lakes or bodies of water under the provisions of Section 19-5-92;

(i) By the board of supervisors of any county of this state for the purpose of acquiring land, property and/or rights-of-way for any project the board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(iv). The board of supervisors of a county may not exercise the right to immediate possession under this paragraph (i) after July 1, 2003;

(j) By a regional economic development alliance created under Section 57-64-1 et seq., for the purpose of acquiring land, property and/or rights-of-way within the project area and necessary for any project such an alliance, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(xxi). An alliance may not exercise the right to immediate possession under this paragraph (j) after July 1, 2012; or

(k) By the board of supervisors of any county of this state for the purpose of acquiring or clearing title to real property, property and/or rights-of-way within the project site and necessary for any project such board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(xxii). A county may not exercise the right to immediate possession under this paragraph (k) after July 1, 2012.

HISTORY: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1975, ch. 447; Laws, 1987 Ex Sess, ch. 24, § 19; Laws, 1989, ch. 535, § 8; Laws, 1990, ch. 470, § 1; Laws, 1994, ch. 310, § 2; Laws, 2000, 3rd Ex Sess, ch. 1, § 11; Laws, 2001, ch. 476, § 2; Laws, 2007, ch. 303, § 11; Laws, 2007, 1st Ex Sess, ch. 1, § 6; Laws, 2008, 1st Ex Sess, ch. 52, eff August 21, 2008; Laws, 2017, ch. 404, § 10, eff from and after July 1, 2017.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected errors in internal statutory references by substituting “this paragraph (e)” for “this paragraph (f)” in paragraph (e), “this paragraph (i)” for “this paragraph (j)” in paragraph (i), “this paragraph (j)” for “this paragraph (k)” in paragraph (j), and “this paragraph (k)” for “this paragraph (l)” in paragraph (k). The Joint Committee ratified the correction at its August 12, 2019, meeting.

Editor’s Notes — Laws of 2001, ch. 476, § 6, provides:

“SECTION 6. Nothing in this act shall be construed to require the prior approval of a levee board for the repair or construction of flood control structures in areas that are not located in a levee district area.”

Cross References — Right of boards of supervisors of certain counties to immediate possession for purpose of constructing federal penitentiary, see § 19-7-41.

Mississippi Superconducting Super Collider Authority, see § 57-67-1 et seq.

Mississippi Superconducting Super Collider Authority’s right to immediate possession of land, see § 57-67-11.

General powers and duties of the Mississippi Major Economic Impact Authority, see § 57-75-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

OPINIONS OF THE ATTORNEY GENERAL

A City may, upon a factual determination that a sludge disposal facility is part of a sewer for purposes of Section 21-37-47(3), use the power of eminent domain to

acquire the property to construct a sludge disposal facility. The municipality may utilize the provisions of Section 11-27-81(f) for immediate possession of rights-of-way to the facility as long as acquisition does not displace any property owner from his or her dwelling or place of business. Brown, September 29, 1995, A.G. Op. #95-0212.

Section 11-27-81 does not permit the Board of Supervisors to take immediate possession when a County desires to take possession of certain land in order to enable the state to construct a state highway. Welch, August 9, 1996, A.G. Op. #96-0402.

The “quick-take” provisions of the statute extend only within the corporate limits of the municipality; thus, there is no authority for a municipality to exercise the right to immediate possession to acquire rights-of-way to a municipal natural gas pipeline located outside the corporate limits of the municipality. Aston, April 10, 1998, A.G. Op. #98-0147.

The term “drainage and other public utility purposes” in subsection (f) encompasses work along a creek or other natural water course to lessen flooding in the municipality, and a municipality has the power pursuant to subsection (f) to take immediate possession under its right of eminent domain of the temporary easements necessary to do the work. Phillips, September 11, 1998, A.G. Op. #98-0567.

A county board of supervisors did not have authority to exercise the right of immediate possession in the acquisition of properties to be used by county school district for athletic facilities or new construction. Smith, June 30, 2000, A.G. Op. #2000-0342.

A regional water supply district is not entitled to adopt and exercise the “quick take” powers set forth in Sections 11-

27-81 through 11-27-91, as the exercise of this power is limited to specific entities for specific purposes and a water district is not one of the specific entities listed as having the power of “quick take.” Applewhite, Oct. 27, 2000, A.G. Op. #2000-0635.

Although the individual municipalities and counties that are members of a regional water management district are entitled to exercise “quick take” procedures, it would circumvent the intent of the statute if the entities having the statutory authority to use “quick take” procedures were to exercise that power for the benefit of entities without such specific authority. Applewhite, Oct. 27, 2000, A.G. Op. #2000-0635.

Rights-of-way for bridges which are part of a state-aid road project as defined in Section 65-9-1 are subject to the right of immediate possession set out in Section 11-27-81(d). Williamson, Sept. 21, 2001, A.G. Op. #01-0599.

There is no authority for the board of commissioners of the Northeast Mississippi Natural Gas District to exercise the right of immediate possession of property pursuant to Section 11-27-81. McElroy, Apr. 11, 2003, A.G. Op. 03-0169

A city may use the quick take provisions of this section to acquire easements for the municipal sewer system in addition to the eminent domain authority of §§ 21-37-47 et seq. Kerby, Sept. 12, 2003, A.G. Op. #03-0467.

A county may use the quick take provisions of this section to acquire a right-of-way for upgrades to the county’s water and sewer service to the county-owned industrial park. A finding by the board of supervisors that no property owner will be displaced from his or her dwelling or place of business should be reflected in an order entered upon the board’s minutes. O’Donnell, Aug. 13, 2004, A.G. Op. #04-0360.

RESEARCH REFERENCES

ALR.

Locating easement of way created by necessity. 36 A.L.R.4th 769.

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent

Domain, Forms 71 et seq. (Allowance of immediate possession; continuation of possession).

CJS.

29A C.J.S., Eminent Domain § 343.

§ 11-27-83. Institution of proceedings; appraisal of property.

If a plaintiff eligible to claim the right of immediate possession under the provisions of Sections 11-27-81 through 11-27-89 shall desire immediate possession of the property sought to be condemned, other than property devoted to a public use, the plaintiff shall so state in the complaint to condemn property filed with the circuit clerk pursuant to Sections 11-27-1 through 11-27-49, Mississippi Code of 1972, and shall therein make and substantiate the following declaration concerning the governmental project for which the property is being condemned:

That the plaintiff shall suffer irreparable harm and delay by exercising the right to condemn said property through eminent domain proceedings pursuant to Sections 11-27-1 through 11-27-49, as opposed to claiming the right of immediate possession of said property pursuant to Sections 11-27-81 through 11-27-89.

The court, or the judge thereof in vacation, as soon as practicable after being satisfied that service of process has been obtained, shall appoint a disinterested, knowledgeable person qualified to make an appraisal of the property described in the complaint to act as appraiser. The appraiser, after viewing the property, shall return to the clerk of court within ten (10) days after his appointment, his report in triplicate, under oath, which report shall state: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the appraiser; and (3) his opinion as to the highest and best use of the property, and a narrative of the facts pertaining to his appraisal.

HISTORY: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1986, ch. 465, § 1; Laws, 1991, ch. 573, § 69, eff from and after July 1, 1991.

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Irreparable harm or delay.

1. In general.

Commission failed to meet its burden of proof in establishing the fair market value of land condemned under the "quick take" provisions because it: (1) used sales that were not comparable to the landowner's property, (2) used only one approach to value, and (3) failed to consider the in-

come approach in light of the subject property's income-producing capacity. *Burks v. Miss. Transp. Comm'n*, 990 So. 2d 200, 2008 Miss. App. LEXIS 8 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 475 (Miss. 2008).

The highway commission's taking of a portion of landowners' property undeniably affected the value of the remaining property where a portion of the owners' parking area was taken and they lost frontage which moved their structure closer to the roadway so that future recon-

struction to the building could be affected, and therefore the highway commission should not have been allowed to have its witness base his appraisal of fair market value of the property on the value of empty lots. To establish a prima facie case of fair market value, the highway commission was required to base its valuation on comparable sales of property which contained a building and which took into account the partial loss of the parking lot. *Howell v. State Highway Com.*, 573 So. 2d 754, 1990 Miss. LEXIS 783 (Miss. 1990).

In a "quick take" eminent domain proceeding, the trial court acted properly in not allowing the landowner to call the court-appointed expert appraiser as a witness. *State Highway Com. v. Culpepper*, 536 So. 2d 18, 1988 Miss. LEXIS 588 (Miss. 1988).

In an eminent domain proceeding under § 11-27-83 in which the state acquired .18

of an acre of land leased by a church, the trial court erred in ordering a \$10,000 additur to the jury verdict of \$7,500 where the church would not lose any building or permanent structure on the taken property, the state had no plans to pave the land taken or place any structure upon it, the highest and best use of the property was for church purposes and not for commercial purposes, and the land taken was property in which the church only held a remaining 20-year leasehold interest. *Mississippi State Highway Com. v. Antioch Baptist Church, Inc.*, 392 So. 2d 512, 1981 Miss. LEXIS 1900 (Miss. 1981).

2. Irreparable harm or delay.

A loss of federal funding occasioned by delay can justify a finding of irreparable harm or delay. *Winters v. City of Columbus*, 735 So. 2d 1104, 1999 Miss. App. LEXIS 142 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 71 et seq. (Allowance of immediate possession; continuation of possession).

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 91 et seq. (Appointment of commissioners).

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 111 et seq. (Report of commissioners).

7 Am. Jur. Legal Forms 2d, Eminent Domain § 97:36 (Appraiser's affidavit of value of interest in land).

§ 11-27-85. Order granting right to immediate title and immediate entry; deposit.

(1) Upon the filing of the report of the appraiser, the clerk shall within three (3) days mail notice to the parties and the court that the report has been filed. The court shall review the report of the appraiser and shall, after not less than five (5) days' notice thereof to the defendants, enter an order granting to the plaintiff title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and the right to immediate entry unless, for other cause shown or for uncertainty concerning the immediate public need for such property pursuant to Section 11-27-83, the judge shall determine that such passing of title, and right of entry should be denied. However, no person lawfully occupying real property shall be required to move from a dwelling or to move his business or farm operation without at least ninety (90) days' written notice prior to the date by which such move is required.

(2) Upon entry of said order, the plaintiff may deposit not less than eighty-five percent (85%) of the amount of the compensation and damages as

determined by the appraiser with the clerk of the court, and upon so doing, the plaintiff shall be granted title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and shall have the right to immediate entry to said property. The defendant, or defendants, shall be entitled to receive the amount so paid to the clerk of the court, which shall be disbursed as their interest may appear, pursuant to order of the court.

(3) Notwithstanding any provisions of subsections (1) and (2) of this section to the contrary, title and immediate possession to real property, including oil, gas and other mineral interests, may be granted under this section to (a) any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution, (b) the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 and any facility related to such project, (c) a regional economic development alliance for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(xxi) and any facility related to the project; and (d) any county for the purpose of acquiring or clearing title to real property, property and rights-of-way for a project as defined in Section 57-75-5(f)(xxii).

HISTORY: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1986, ch. 465, § 2; Laws, 1988, ch. 447, § 1; Laws, 1991, ch. 573, § 70; Laws, 1994, ch. 310, § 3; Laws, 2000, 3rd Ex Sess, ch. 1, § 12; Laws, 2007, ch. 303, § 29; Laws, 2007, 1st Ex Sess, ch. 1, § 7, eff from and after passage (approved May 11, 2007).

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

Mississippi Major Economic Impact Authority generally, see § 57-75-1 et seq.

JUDICIAL DECISIONS

1. In general.

There was no problem with a jury instruction that told the jurors that a deposit of funds for the benefit of the landowner had been made in an eminent domain proceeding; the instruction was no more than a summary of Miss. Code Ann. § 11-27-85(2). *North Biloxi Dev. Co., L.L.C. v. Miss. Transp. Comm'n*, 912 So. 2d 1118, 2005 Miss. App. LEXIS 750 (Miss. Ct. App. 2005).

The only purpose of the report of a court-appointed expert appraiser is to ascertain the value of the property to determine the amount of money that should be put on deposit with the clerk of the court pursuant to § 11-27-85. *Hudspeth v. State*

Highway Com., 534 So. 2d 210, 1988 Miss. LEXIS 546 (Miss. 1988).

Under the quick-take law (Code 1972, §§ 11-27-81 through 11-27-91), the defendants have the absolute right to withdraw the funds deposited by the petitioner subject only to the order of the court as to their distribution, and the petitioner has no further control of the funds and no right to withdraw them after they are deposited; under these circumstances, the petitioner should not and is not required to pay interest on the amount deposited after the date of its deposit. *Mississippi State Highway Com. v. Owen*, 310 So. 2d 920, 1975 Miss. LEXIS 1923 (Miss. 1975).

RESEARCH REFERENCES

ALR.

Payment or deposit in court as affecting condemnor's right to appeal. 40 A.L.R.3d 203.

Am. Jur.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 80-85 (Order granting immediate possession).

§ 11-27-87. Effect of insufficiency or excess of deposit.

If the plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of compensation as determined upon final disposition of the case is in excess of the amount of the deposit, the plaintiff shall pay interest to the owner at the rate of eight percent (8%) per annum upon the amount of such excess from the date of the filing of the complaint until payment is actually made. If the plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of the compensation as determined upon final disposition of the case is less than the amount of the deposit, the plaintiff shall be entitled to a personal judgment against the owner for the amount of the difference.

HISTORY: Codes, 1972, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1988, ch. 447, § 2; Laws, 1991, ch. 573, § 71, eff from and after July 1, 1991.

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the date a law firm improperly filed a lis pendens. *Lehman v. Miss. Transp. Comm'n*, 127 So. 3d 277, 2013 Miss. App. LEXIS 363 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

Under the quick-take law, the landowner is entitled to interest on the excess of the amount paid to the court at the rate of 8 per cent per annum from the date the

petition was filed until the judgment is finally paid, and there was no merit in petitioner's contention that the landowner was only entitled to 6 per cent interest on this amount for the reason that petitioner did not physically take possession of the property; the petitioner had the right of entry and possession, and what it did relative to taking actual physical possession of the property was entirely within its discretion. *Mississippi State Highway Com. v. Owen*, 310 So. 2d 920, 1975 Miss. LEXIS 1923 (Miss. 1975).

§ 11-27-89. Compensation of appraiser; right to jury trial.

The appraiser shall receive as compensation for his services such sum, plus expenses, as the court allows, which shall be taxed as cost in the proceedings. The sum allowed shall be based upon the degree of difficulty and the time required to perform the appraisal, but may not exceed One Thousand Dollars (\$1,000.00) unless, in the opinion of the court, special circumstances

warrant a greater sum. An order granting a sum greater than One Thousand Dollars (\$1,000.00) must describe in detail the special circumstances that warrant payment of a greater sum.

The making of a deposit by the plaintiff or the withdrawal of said deposit by the defendant or defendants shall not prejudice the right of any party to a trial by jury in the special court of eminent domain to determine the fair market value of the property to be condemned and the damages, if any, to the remainder if less than the whole is taken, as provided in Sections 11-27-1 through 11-27-49, Mississippi Code of 1972.

HISTORY: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1991, ch. 573, § 72; Laws, 1993, ch. 361, § 1; Laws, 2000, ch. 451, § 1, eff from and after passage (approved Apr. 18, 2000.).

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

In a "quick take" eminent domain proceeding, the trial court acted properly in not allowing the landowner to call the court-appointed expert appraiser as a witness. *State Highway Com. v. Culpepper*, 536 So. 2d 18, 1988 Miss. LEXIS 588 (Miss. 1988).

The limiting amount of § 11-27-89 is for "services," not for "an appraisal." *State Highway Com. v. Rankin County Bd. of Education*, 531 So. 2d 612, 1988 Miss. LEXIS 429 (Miss. 1988).

§ 11-27-91. Special funds and accounts of highway commission.

The highway commission of the State of Mississippi is hereby authorized to set up and maintain such special funds and accounts as it may consider necessary and proper to make the deposits and pay the costs as authorized by Sections 11-27-81 through 11-27-89, and to pay such judgments as may be entered and such other costs as may be incidental to the acquisition of property for right-of-way purposes. Disbursement from such special funds shall be by check properly drawn against said fund signed by such personnel as may be duly authorized by the highway commission of the State of Mississippi.

HISTORY: Codes, 1942, § 2749-04.6; Laws, 1972, ch. 489, § 2, eff from and after passage (approved May 10, 1972).

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

CHAPTER 29.

SEQUESTRATION

Sec.

- 11-29-1. Issuance of writ of sequestration.
- 11-29-3. Affidavit required.
- 11-29-5. Security required.
- 11-29-7. Writ granted by chancellor or judge.
- 11-29-9. Contents of writ.
- 11-29-11. Complainant may bond the property in certain cases.
- 11-29-13. Disposal of property if not bonded.

§ 11-29-1. Issuance of writ of sequestration.

When a bill is filed in the chancery court in reference to personal property, and affidavit and bond as required therefor is made and filed, the clerk of the court shall issue a writ of sequestration.

HISTORY: Codes, 1880, § 1854; 1892, § 511; 1906, § 562; Hemingway's 1917, § 322; 1930, § 408; 1942, § 1328.

Cross References — Jurisdiction to grant remedial writs, see § 9-1-19.

Procedure for attachment of perishable commodities, see §§ 11-1-43 through 11-1-49.

Circuit court order to protect property in controversy, see § 11-7-169.

Writ to seize property in partition proceeding, see § 11-21-77.

Attachment in chancery against nonresident, absent or absconding debtors, see § 11-31-1 et seq.

Attachment at law against debtors, see § 11-33-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The state sequestration statutes, under which property could be impounded and put beyond use during the pendency of litigation on an alleged debt, all by a writ of sequestration issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer, violated due process both facially and as applied. *Keelon v. Davis*, 475 F. Supp. 204, 1979 U.S. Dist. LEXIS 13403 (N.D. Miss. 1979).

Although there had been reasonable grounds upon which to seek the issuance of a writ of sequestration of defendant's funds and the writ was not wrongfully sued out in the first instance, the sequestration would be set aside where subsequent developments demonstrated that the funds had been wrongfully sequestered because of plaintiff's failure to sus-

tain her cause of action in any material respect. *Altherr v. Swiss American of Mississippi, Inc.*, 446 F. Supp. 17, 1977 U.S. Dist. LEXIS 16482 (N.D. Miss. 1977).

Personal property in the state of a non-resident may be seized under an attachment in chancery to await final decree upon filing the required affidavit and bond. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Seizure of automobile under writ of sequestration issued after sequestration bond was duly furnished by complainant was void where no affidavit was filed showing that complainant had good reason to believe, and did believe, that there was danger of the removal of the property involved in the suit beyond the limits of the state or of its concealment in the state so as to be beyond the process of the court,

or of its transfer so as to defeat the rights of complainant, and that such removal, concealment or transfer was about to occur. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Writ of sequestration can be issued only in pending case where complaint has been filed and is in reference to personal property; writ of sequestration issued prior to

filing bill is irregular and should be quashed on motion. *Yazoo Delta Mortg. Co. v. Hutson*, 140 Miss. 461, 106 So. 5, 1925 Miss. LEXIS 280 (Miss. 1925).

Chancery court has jurisdiction of writ of sequestration for preservation of personal property independent of statute. *Dean v. Boyd*, 86 Miss. 204, 38 So. 297, 1905 Miss. LEXIS 22 (Miss. 1905).

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration, § 19.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 8 (Writ of sequestration to preserve property pending litigation).

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 26 (Writ of sequestration for failure to comply with court order).

Writ of sequestration, 18 Am. Jur. Pl & Pr Forms, Sequestration, Forms 421, 422.

CJS.

79A C.J.S., Sequestration § 23.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-3. Affidavit required.

Before any writ of sequestration shall issue, the complainant shall make and file an affidavit showing that he has good cause to believe, and does believe, that there is danger of the removal of the property involved in the suit beyond the limits of the state, or of its concealment in the state so as to be beyond the process of the court, or of its transfer so as to defeat the rights of the complainant, and that such removal, concealment, or transfer is about to occur, and, moreover, shall give the bond required by Section 11-29-5.

HISTORY: Codes, 1880, § 1854; 1892, § 512; 1906, § 563; Hemingway's 1917, § 323; 1930, § 409; 1942, § 1329.

Cross References — Affidavit required for attachments against debtors, see § 11-33-9.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Personal property in the state of a non-resident may be seized under an attachment in chancery to await final decree upon filing the required affidavit and bond. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Seizure of automobile of nonresident under writ of sequestration was void, and

court had no jurisdiction to order a sale of trust property, where no affidavit was filed as required by this section [Code 1942, § 1329]. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

The personal property of a non-resident defendant can be seized under an attachment in chancery to await final decree

only upon affidavit and bond as required by this section [Code 1942, § 1329] regulating the writ of sequestration. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313, 1905 Miss. LEXIS 27 (Miss. 1905).

Decree refusing to dismiss sequestration proceedings will not be reversed because of error in not requiring affidavit to be amended so as to conform literally with statute. *Dean v. Boyd*, 86 Miss. 204, 38 So. 297, 1905 Miss. LEXIS 22 (Miss. 1905).

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration, § 19.

CJS.

79A C.J.S., Sequestration §§ 12-17.

Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

Law Reviews.

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§ 11-29-5. Security required.

Before the writ of sequestration shall issue in any case, the complainant shall enter into bond with sufficient sureties, payable to the defendant, in double the value of the property proposed to be seized, to be fixed by the clerk from affidavit, or such evidence as may satisfy him, conditioned to pay all damages which may accrue from the wrongful seizure of the property to be sequestered, which bond shall be filed in the cause.

HISTORY: Codes, 1880, § 1854; 1892, § 513; 1906, § 564; *Hemingway's* 1917, § 325; 1930, § 410; 1942, § 1330.

Cross References — Bond required for seizure of perishable commodities, see § 11-1-43.

Bond required in attachments against debtors, see §§ 11-33-11 through 11-33-15.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where mule was sequestered sureties on bond not liable when mule died before final decree. *Gaddis v. Clegg*, 118 Miss. 607, 79 So. 811 (Miss. 1918).

The personal property of a nonresident defendant can be seized under an attachment in chancery to await final decree only upon affidavit and bond as required by this section [Code 1942, § 1330]. *Ad-*

vance Lumber Co. v. Laurel Nat'l Bank, 86 Miss. 419, 38 So. 313, 1905 Miss. LEXIS 27 (Miss. 1905).

The bond secures damages resulting from the wrongful seizure of the property, but not attorney's fees and other expenses incident to the case in which the writ is obtained. *Stauffer v. Garrison*, 61 Miss. 67, 1883 Miss. LEXIS 73 (Miss. 1883).

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration §§ 18, 40, 41.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 5 (Bond by plaintiff to sequester personal property during pendency of action).

CJS.

79A C.J.S., Sequestration §§ 12-17.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-7. Writ granted by chancellor or judge.

Writs of sequestration may also be ordered, and the amount of the bond to be given therefor by complainant may be prescribed, by the chancellor or by any judge authorized to grant remedial process of such nature.

HISTORY: Codes, 1880, § 1854; 1892, § 517; 1906, § 568; Hemingway's 1917, § 328; 1930, § 411; 1942, § 1331.

Cross References — Jurisdiction to grant writ of sequestration, see § 9-1-19. Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration § 19.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 8 (Writ of sequestration to preserve property pending litigation).

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 26 (Writ of sequestration for failure to comply with court order).

CJS.

79A C.J.S., Sequestration § 23.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-9. Contents of writ.

The writ of sequestration shall be directed to the sheriff or other proper officer commanding him to seize and take into possession the property in question and to hold the same until the further order of the court or chancellor, or until the defendant from whose possession the same was taken shall enter into bond with sufficient sureties, payable to the complainant in double the value of the property, to be assessed by the officer, conditioned to have the property forthcoming to abide the decree to be made by the court in the cause, or until the said defendant shall enter into bond with sufficient sureties, to be approved by the officer, payable to the complainant, in double the amount of the indebtedness claimed, conditioned for the performance of such final decree as may be entered in the cause. If a forthcoming bond be given, it shall be returned with the writ and filed in the cause, and, in case the property shall not be delivered or forthcoming to abide the decree, the bond shall have the

force and effect of a judgment; and execution may issue thereon against all the obligors for the amount of the decree or the value of the property, according to the nature of the case. If a bond in double the debt be given, it shall be returned and filed with the papers in the cause. A bond in double the value of the property shall always be required, except when its value shall greatly exceed the debt and all probable costs.

HISTORY: Codes, 1880, § 1854; 1892, § 514; 1906, § 565; Hemingway's 1917, § 324; 1930, § 412; 1942, § 1332.

Cross References — Writ of sequestration dealing with perishable commodities, see § 11-1-43.

Writ of sequestration in proceedings to partition personal property, see § 11-21-71.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Independently of statute, a court of equity has jurisdiction to issue writ of seizure and preserve personal property awaiting final decree. *Lee v. Lee*, 135 Miss. 865, 101 So. 345, 1924 Miss. LEXIS 89 (Miss. 1924).

Sequestration bond is separate and distinct from injunction bond. *Harleston v. West Louisiana Bank*, 126 Miss. 593, 89 So. 257, 1921 Miss. LEXIS 67 (Miss. 1921).

Sequestration bond may be required to be made in Supreme Court. *Harleston v. West Louisiana Bank*, 126 Miss. 593, 89 So. 257, 1921 Miss. LEXIS 67 (Miss. 1921).

In suit by tenants to cancel deed absolute in form on theory that it was a mortgage, on cross-bill of defendant landlord it is within the discretion of the chancellor to issue writ of sequestration to seize

sufficient crops to cover rents upon proper bond to indemnify complainants. *McGehee v. Weeks*, 112 Miss. 483, 73 So. 287, 1916 Miss. LEXIS 132 (Miss. 1916).

Where property was sequestered, defendant's forthcoming bond was governed by this section [Code 1942, § 1332] and court could not give decree thereon for wrongful detention. *Bomer v. Meeks*, 106 Miss. 870, 64 So. 833, 1914 Miss. LEXIS 31 (Miss. 1914).

Forthcoming bond need be only double the debt where the value of the property greatly exceeds the debt, but where debt equals or exceeds the value of the property bond must be double value or property. *Bomer v. Meeks*, 106 Miss. 870, 64 So. 833, 1914 Miss. LEXIS 31 (Miss. 1914).

Sequestration bond with only one surety may be amended so as to comply with law. *Dean v. Boyd*, 86 Miss. 204, 38 So. 297, 1905 Miss. LEXIS 22 (Miss. 1905).

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration § 25.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 34 (Bond by defendant to retain possession of sequestered property).

CJS.

79A C.J.S., Sequestration § 21.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-11. Complainant may bond the property in certain cases.

Should the defendant fail to give bond as above allowed, within five days from the date of seizure, then the complainant at whose instance the property was seized may give such bond and receive the property. In such case, the bond shall be dealt with in all respects as if the defendant had given it and retained the property.

HISTORY: Codes, 1880, § 1854; 1892, § 515; 1906, § 566; Hemingway's 1917, § 326; 1930, § 413; 1942, § 1333.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

In suit by tenants to cancel deed absolute in form on theory that it was a mortgage, on cross-bill by defendant landlord it is within the discretion of the chancellor

to issue writ of sequestration to seize sufficient crops to cover rents upon proper bond to indemnify complainants. *McGehee v. Weeks*, 112 Miss. 483, 73 So. 287, 1916 Miss. LEXIS 132 (Miss. 1916).

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration, § 24.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 33 (Bond by plaintiff to indemnify sequestering officer).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

CJS.

79A C.J.S., Sequestration §§ 30-52.

§ 11-29-13. Disposal of property if not bonded.

If neither of the parties litigant shall give such bond as allowed within ten days after the seizure, the officer having possession of the property shall sell the same, in the mode prescribed by law for selling property levied upon under writs of fieri facias, if the property be liable to waste or decay, or if subject to extraordinary expense in preserving the same, and hold the proceeds subject to the future orders of the court. If the property be not liable to waste or decay, or be not expensive to keep, it shall be held by such officer, unless the court or the chancellor shall order it to be sold, as may be done when it is thought best to do so. If such property shall be sold, either by the officer seizing it, in the state of case provided for when he may sell it, or by order of the court or chancellor, the proceeds of such sale shall be subject to the orders of the court or chancellor, as to their safe keeping or investment, during the litigation. If the property seized be liable to immediate waste or decay, it shall be sold immediately. If the defendant do not give bond to retain the property within five days from its seizure, and the complainant do not do so within five days after defendant's failure, either party may, before sale of the property, give the

required bond and receive the property, or after sale may give such bond and receive the proceeds.

HISTORY: Codes, 1880, § 1854; 1892, § 516; 1906, § 567; Hemingway's 1917, § 327; 1930, § 414; 1942, § 1334.

Cross References — Sale of property under attachment, see §§ 11-33-71 and 11-33-73.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where in suit to enforce a mechanic's lien for labor done on a wrecked automobile, the bill of complaint alleged that credit company claimed some interest in such automobile, and such credit company was served with process by publication and decree pro confesso was taken against such company upon its failure to appear, and on appeal credit company was permitted to file forthcoming bond, appeal could not be defeated on ground that credit company was not a party to the suit. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Where automobile seized under writ of sequestration in an attachment in chan-

cery was ordered sold for the payment of complainant's mechanic lien thereon, and neither party had given bond therefor, defendant on appeal before sale was entitled to give forthcoming bond in amount sufficient to protect the rights of all the parties and to receive automobile from sheriff pending final determination of cause. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

The independent and illegal act of the sheriff in selling property not subject to waste or decay is not cause for reversal of the decree of the court. *Day v. Hartman*, 74 Miss. 489, 21 So. 302, 1896 Miss. LEXIS 172 (Miss. 1896).

RESEARCH REFERENCES

Am. Jur.

70 Am. Jur. 2d, Sequestration, §§ 28, 30.

CJS.

50A C.J.S., Judicial Sales §§ 28-47.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

CHAPTER 31.

ATTACHMENT IN CHANCERY AGAINST
NONRESIDENT, ABSENT OR ABSCONDING DEBTORS

Sec.

- 11-31-1. Jurisdiction; debtors.
- 11-31-2. Application for order of attachment; determination.
- 11-31-3. Attaching property or indebtedness.
- 11-31-5. Levy on land.
- 11-31-7. Writs of sequestration for personal property.
- 11-31-9. Publication for appearance of defendant.
- 11-31-11. Complainant to give security after decree rendered.

§ 11-31-1. Jurisdiction; debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

HISTORY: Codes, 1880, § 1832; 1892, § 486; 1906, § 536; Hemingway's 1917, § 293; 1930, § 173; 1942, § 2729.

Cross References — Cases in which attachment is a remedy, see § 11-33-1.

Disposal of exempt property, see § 85-3-49.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

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| <ul style="list-style-type: none"> 1. Validity. 2. Construction and application generally. 3. Jurisdiction. 4. —Special appearance. 5. Demands on which attachment may be founded. 6. Property subject to attachment. 7. Persons entitled to sue. 8. Nonresidents. 9. Persons subject to attachment. 10. Procedure. 11. Pleading. 12. Parties. | <ul style="list-style-type: none"> 13. Judgment. 14. —Pro confesso decree. 15. —Personal decrees. 16. Res judicata. 17. Auxiliary relief. 18. —Injunction. 19. —Receiver, appointment of. 20. Damages. 21. —Attorney fees, allowance of. |
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1. Validity.

Inclusion of safeguards to minimize the risk of an erroneous pre-hearing deprivation, coupled with the availability of an immediate post-attachment hearing to dissolve the attachment, met the demands

of due process; the Mississippi statute required that the complainant set forth the specific facts supporting his claim and permitted an order of attachment to issue only if the chancellor found the complainant had established a prima facie case demonstrating his right to recover on his claim, the Mississippi statute required that the complainant state specific reasons why his ability to recover on his claim was at risk if the order of attachment was not issued, and attachment was only available if the chancellor found that the complainant's ability to recover could be significantly impaired or impeded without an order of attachment, and the Mississippi procedure mandated that the complainant put up a bond to protect the defendant in the event the attachment was later found to have been wrongful. *Performance Drilling Co., LLC v. H & H Welding, LLC*, 2009 U.S. Dist. LEXIS 32190 (S.D. Miss. Apr. 15, 2009).

Mississippi Attachment Statute (§§ 11-31-1 et seq.) is not unconstitutional notwithstanding defendant's contentions that (1) it fails to require nexus between property attached and underlying claim, (2) it does not provide for pre-seizure notice or pre-seizure hearing, (3) it prohibits defendant from making limited appearance to defend his claim to property attached, (4) its bond requirements are unfair and discriminatory as to attached defendant, and (5) it is silent as to future accruing debts. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285, 1985 U.S. Dist. LEXIS 22471 (S.D. Miss. 1985).

The statutory procedure for the attachment of realty, under which attachment could be invoked without any showing of a particularized need, so long as defendant debtor was a nonresident, was violative of due process both facially and as applied to the breach of contract action at issue. *M P I, Inc. v. McCullough*, 463 F. Supp. 887, 1978 U.S. Dist. LEXIS 7247 (N.D. Miss. 1978).

The statutory provisions allowing for attachment in chancery against nonresident, absent or absconding debtors were unconstitutional on their face and as applied where, inter alia, they did not require the plaintiff to obtain any court

ordered writ of sequestration or garnishment, where no bond was required of the plaintiff, where there was no judicial review of the validity of the attachment, either before or after service upon the attachment defendant, and where only by prevailing at trial on the merits could the principal defendant obtain relief from the attached indebtedness; as a matter of fairness and justice, sums owed to the principal defendant by nonresident attachment defendants arising out of transactions having no connection with Mississippi would be excluded from garnishment. *Mississippi Chemical Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925, 1977 U.S. Dist. LEXIS 18154 (S.D. Miss. 1977).

Statute authorizing attachment suit against nonresident railroad doing business in county where necessary defendant may be found but where nonresident has no line of railroad or agent held not to deprive nonresident of equal protection of law. *Clark v. Louisville & N. R. Co.*, 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

Attachment suit against nonresidents brought in county of any necessary defendants as authorized by statute does not unconstitutionally discriminate against any necessary defendant. *Clark v. Louisville & N. R. Co.*, 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

Attachment proceeding against nonresident interstate railroad in which traffic balances due defendant from other interstate railroads were impounded held not unlawful burden on interstate commerce. *Clark v. Louisville & N. R. Co.*, 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

2. Construction and application generally.

In an action against an out-of-state university, where the university engaged in a wide variety of educational functions in the recruitment and education of students from Mississippi, encouraged alumni activities in Mississippi, including the solicitation and acceptance of funds from alumni and friends in the state, and participated in a variety of intercollegiate competitions and activities with private and public institutions in Mississippi,

such activities were sufficient under § 11-31-1 to render it constitutionally amenable to an adjudication of its rights in funds held by a clerk of the Chancery court. *Administrators of Tulane Educational Fund v. Cooley*, 462 So. 2d 696, 1984 Miss. LEXIS 2051 (Miss. 1984), cert. denied, 474 U.S. 820, 106 S. Ct. 70, 88 L. Ed. 2d 57, 1985 U.S. LEXIS 3244 (U.S. 1985).

In action by Kansas resident against defendant drug company, a Delaware corporation, for damages resulting from the use of birth control pills manufactured by defendant and sold in Kansas, plaintiff could properly attach under Code 1942, § 2729, moneys owed by 3 drug wholesale firms indebted to the defendant who did business in Mississippi, notwithstanding that the defendant owned no property in Mississippi and was not licensed to do business in Mississippi. *Steele v. G. D. Searle & Co.*, 483 F.2d 339, 1973 U.S. App. LEXIS 8350 (5th Cir. Miss. 1973), cert. denied, 415 U.S. 958, 94 S. Ct. 1486, 39 L. Ed. 2d 572, 1974 U.S. LEXIS 996 (U.S. 1974).

An action on a contract against a non-resident defendant initiated by attachment in chancery under the provisions of this section [Code 1942, § 2729] is not an action in rem, but one in personam. *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 1968 U.S. App. LEXIS 8302 (10th Cir. Okla.), cert. denied, 391 U.S. 905, 88 S. Ct. 1654, 20 L. Ed. 2d 419, 1968 U.S. LEXIS 1784 (U.S. 1968).

In the absence of any allegation in the bill of complaint or of proof to sustain an attachment in chancery, a real estate broker's suit for a commission allegedly earned by him should have been dismissed; however, the Supreme Court may not reverse because of error or mistake as to whether a cause is of equity or common law jurisdiction. *Minter v. Hart*, 208 So. 2d 169, 1968 Miss. LEXIS 1397 (Miss. 1968).

The status quo of an attachment in chancery is not preserved by statute while the appeal is pending, as attachments in the Circuit Court are preserved by Code 1942, § 2724; and where a second non-resident attachment proceeding was brought against the same property after the first action had been appealed, the

dubious effectiveness of the original attachment and *lis pendens* after an appeal had been taken without supersedeas, and because new issues had arisen which required the joinder of additional parties defendant, the second attachment should not have been quashed on the ground of a prior pending action. *General Acceptance Corp. v. Holbrook*, 189 So. 2d 923, 1966 Miss. LEXIS 1385 (Miss. 1966).

Attachments in chancery in Mississippi are unique proceedings in the field of attachment law in the sense that the service of the attachment defendant does not bring any fund into the possession, custody, or control of the court, no moneys are paid into the registry of the court, and no bond is required. *Dunn v. Stewart*, 235 F. Supp. 955, 1964 U.S. Dist. LEXIS 6859 (S.D. Miss. 1964), rev'd, 363 F.2d 591, 1966 U.S. App. LEXIS 5653 (5th Cir. Miss. 1966).

Garnishment will not lie against the attachment defendant at the initiation of the action. *Dunn v. Stewart*, 235 F. Supp. 955, 1964 U.S. Dist. LEXIS 6859 (S.D. Miss. 1964), rev'd, 363 F.2d 591, 1966 U.S. App. LEXIS 5653 (5th Cir. Miss. 1966).

The attachment of the property of a nonresident creates a lien which attaches when the writ is served. *Associates Discount Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535, 1961 Miss. LEXIS 503 (Miss. 1961).

An attachment in chancery is primarily a proceeding in rem. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

That Code commissioners took statute providing for attachments in chancery out of chancery court chapter and placed it in chapter on attachment neither added to nor took anything away from statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Garnishment statutes held inapplicable to attachments in chancery, wherein pleadings, practice, and procedure are that of chancery court except where otherwise provided by statutes. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Attachment statutes held inapplicable to attachments in chancery, wherein

pleadings, practice, and procedure are that of chancery court except where otherwise provided by statutes. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Neither statute preventing for 96 hours remission of proceeds of draft, nor attachment suit, changed the relationship of debtor and creditor and converted collecting bank into trustee for forwarding bank or latter's principal. *Love v. Fulton Iron Works*, 162 Miss. 890, 140 So. 528, 1932 Miss. LEXIS 181 (Miss. 1932).

3. Jurisdiction.

Where the bill of complaint in a suit for attachment and garnishment alleged that the debtor owed the complainant for certain building material found to be in the possession of the defendant in Mississippi, and the defendant filed an answer in which he admitted that he had certain effects belonging to the debtor, the jurisdiction of the chancery court was established. *Crescent Plywood Co. v. Lawrence*, 305 So. 2d 343, 1974 Miss. LEXIS 1477 (Miss. 1974).

An attachment is not invalid because the complainant's motion for leave to amend and ask for an attachment was not sworn to, where the jurisdictional facts contributing grounds for attachment had been stated in the complaint. *Illinois C. R. Co. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805, 1963 Miss. LEXIS 486 (Miss. 1963).

In an attachment suit brought in a chancery court by an Alabama citizen to recover damages from an Alabama corporation for personal injuries received as a result of a railroad crossing accident in Alabama, and to attach funds or property in the hands of a Mississippi corporation, where the plaintiff did not get process by publication of summons on the nonresident defendant as required by Code 1942, § 2733, but relied solely on the attempted personal service executed on an employee, who was not such an agent of defendant upon whom process could be served, the chancellor committed reversible error in overruling defendant's motion to dismiss for want of jurisdiction, even though the Mississippi corporation had answered admitting an indebtedness due to the defendant. *Alabama, T. & N. R. Co. v. Howell*,

244 Miss. 157, 141 So. 2d 242, 1962 Miss. LEXIS 433 (Miss. 1962).

Jurisdiction of an action against a non-resident unincorporated labor union may be obtained by an attachment of its personal property within the state. *Lowery v. International Brotherhood of Boilermakers, etc.*, 241 Miss. 458, 130 So. 2d 831, 1961 Miss. LEXIS 365 (Miss. 1961).

Where an attachment suit was filed in chancery against a resident defendant and a nonresident defendant to subject funds that were in the hands of resident defendant, to determine which of the two defendants was liable to the complainants for labor performed on resident defendant's leased premises, and where also a bill of discovery was filed as to what funds resident defendant had in his hands belonging to the nonresident defendant, there was sufficient to confer jurisdiction on chancery court. *Taylor v. Hines*, 221 Miss. 759, 74 So. 2d 834, 1954 Miss. LEXIS 590 (Miss. 1954).

Neither a special nor a general appearance by a defendant admits the jurisdiction of the court. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633, 1948 Miss. LEXIS 247 (Miss. 1948).

Jurisdiction in attachment suits is lacking where the defendant does not own the land upon which the attachment is levied. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633, 1948 Miss. LEXIS 247 (Miss. 1948).

Attachment proceedings cannot be sustained where nonresident debtor has no lands in this state and no effects in the hands of some resident third person, and where no resident third person is alleged to be indebted to him, although he may have personalty in this state. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Attachment will not lie to reach the interest of nonresident partners in a partnership bank deposit, where to do so it would be necessary for the court to wind up the partnership and distribute its assets in order to ascertain the interest of such nonresident partners. *S. & W. Const. Co. v. Wood*, 194 Miss. 831, 13 So. 2d 625, 1943 Miss. LEXIS 102 (Miss. 1943).

Lower court properly overruled motion to dismiss bill of complaint upon quashing

of attachment against partnership, consisting of one resident and two nonresident members, since complainant's claim for damages remains for trial against two members of the partnership on whom process was served. *S. & W. Const. Co. v. Wood*, 194 Miss. 831, 13 So. 2d 625, 1943 Miss. LEXIS 102 (Miss. 1943).

Equity jurisdiction by attachment under this section [Code 1942, § 2729] can be raised by motion separately filed. *Ford v. Mutual Life Ins. Co.*, 194 Miss. 519, 13 So. 2d 45, 1943 Miss. LEXIS 94 (Miss. 1943).

In order to sustain an attachment in chancery against a nonresident, there must be a debt owing from the nonresident, and there must be effects in the hands of the resident defendants, or land must be attached in the manner provided by the statute to give the court jurisdiction. *York v. York*, 187 Miss. 465, 193 So. 330, 1940 Miss. LEXIS 223 (Miss. 1940).

Words "persons in this State" mean persons residing in this State, and process on nonresidents temporarily residing in State does not give court jurisdiction over them. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571, 1938 Miss. LEXIS 109 (Miss. 1938).

Service of process in another county upon corporation domesticated in State did not give court jurisdiction over it in absence of process on defendant residing in county. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571, 1938 Miss. LEXIS 109 (Miss. 1938).

Chancery court held to have jurisdiction of foreign attachment to recover unliquidated claim for alimony from executors of estate of deceased father of principal defendant under statute providing that chancery court shall have jurisdiction of attachment suits for breach of contract, express or implied, against persons in Mississippi having in their hands effects of, or indebted to, an absent or absconding debtor. *Kearney v. Kearney*, 178 Miss. 766, 174 So. 59, 1937 Miss. LEXIS 246 (Miss. 1937).

Circuit court held vested with jurisdiction of action transferred by chancery court, whether action was one of law cognizance or not. *Dunn v. Dent*, 176 Miss. 786, 170 So. 299, 1936 Miss. LEXIS 174 (Miss. 1936).

Chancery court of county in which attachment suit was filed against domestic bank, which bill alleged was domiciled in another county, and foreign bank, to which garnished domestic corporation, domiciled in another county, was alleged to be indebted, to recover amount of check on ground of banks' negligence in collection thereof, had no territorial jurisdiction of domestic bank, between which and garnishee there was neither privity nor connection. *Estes v. Bank of Walnut Grove*, 172 Miss. 499, 159 So. 104, 1935 Miss. LEXIS 107 (Miss. 1935).

Court, by personal service on agent of garnishee, foreign corporation, found doing business in State, and therefore subject to suit by nonresident employee, creditor, acquired jurisdiction over garnishee to require answer and to condemn any indebtedness due from it to employee-creditor under employment contract made and performable outside State. *Bean v. Bean*, 166 Miss. 434, 147 So. 306, 1933 Miss. LEXIS 367 (Miss. 1933).

Chancery court acquired jurisdiction of attachment suit where defendant did not plead specially to court's jurisdiction but defended generally. *Mobile & O.R. Co. v. Swain*, 164 Miss. 825, 145 So. 627, 1933 Miss. LEXIS 255 (Miss. 1933).

Chancery court has jurisdiction to subject property in hands of resident defendant to obligation of non-resident in favor of creditor; exercise of statutory jurisdiction to subject property in hands of resident defendant to obligation of non-resident is not one of original jurisdiction. *Boyett v. Boyett*, 152 Miss. 201, 119 So. 299, 1928 Miss. LEXIS 262 (Miss. 1928).

Chancery court cannot try claimant's issue against non-resident claimant who does not voluntarily enter his appearance or who has not been personally served with process. *Delta Ins. & Realty Agency v. Fourth Nat'l Bank*, 137 Miss. 855, 102 So. 846, 1925 Miss. LEXIS 31 (Miss. 1925).

Chancery court on a bill against a non-resident partner to enforce his individual liability for a debt, had jurisdiction to issue an attachment against his individual real estate in Mississippi. *Dinwiddie v. Glass*, 111 Miss. 449, 71 So. 745, 1916 Miss. LEXIS 319 (Miss. 1916).

If the garnishee be personally served with process in this state the court acquires jurisdiction over him and can garnish the debt due the debtor of plaintiff and condemn it, provided the garnishee could himself be sued by his creditors in this state, regardless of the original situs of the debt outside the state. *Southern P. R. Co. v. A. J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, 1911 Miss. LEXIS 188 (Miss. 1911).

Chancery court has no jurisdiction of an attachment against a non-resident debtor unless the land or tenements of the non-resident be levied upon or the resident defendant be indebted to or have effects of the non-resident in his hands or possession. *Louis Werner Sawmill Co. v. Sheffield*, 89 Miss. 12, 42 So. 876, 1906 Miss. LEXIS 91 (Miss. 1906).

The court under this section [Code 1942, § 2729] has no jurisdiction of an attachment of a nonresident debtor who has no lands in this state and no effects in the hands of some resident although he have personalty in this state. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313, 1905 Miss. LEXIS 27 (Miss. 1905).

Independently of statute, by virtue of its general equity powers, the court may, without a judgment at law and nulla bona return, subject to the demand of creditors the effects in this state of a non-resident. *Dollman v. Moore*, 70 Miss. 267, 12 So. 23, 1892 Miss. LEXIS 84 (Miss. 1892).

The basis of the chancery jurisdiction is statutory. Complainant need not show equity independent of the statute. *Scruggs v. Blair*, 44 Miss. 406, 1870 Miss. LEXIS 126 (Miss. 1870); *Statham v. New York Life Ins. Co.*, 45 Miss. 581, 1871 Miss. LEXIS 106 (Miss. 1871); *T. H. & J. M. Allen & Co. v. Montgomery*, 48 Miss. 101, 1873 Miss. LEXIS 39 (Miss. 1873).

4. —Special appearance.

Special appearance by a foreign domesticated insurance company, challenging the jurisdiction of the court, resulting in a quashing of the attachment, did not authorize the chancellor to dismiss the bill where personal process had been had on the insurance company by service upon the state insurance commissioner. *Ford v.*

Mutual Life Ins. Co., 194 Miss. 519, 13 So. 2d 45, 1943 Miss. LEXIS 94 (Miss. 1943).

Nonresident debtor in attachment suit, appearing solely for purpose of objecting, did not, thereby, submit to jurisdiction of court. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571, 1938 Miss. LEXIS 109 (Miss. 1938).

Defendant's appearance especially for purpose of moving to quash attachment and dismiss bill for want of jurisdiction cannot operate as personal appearance. *First Nat'l Bank v. Mississippi Cottonseed Products Co.*, 171 Miss. 282, 157 So. 349, 1934 Miss. LEXIS 225 (Miss. 1934).

5. Demands on which attachment may be founded.

In an action against a sheriff and his surety based on the sheriff's alleged tort, it is not necessary that the sheriff's liability be determined and fixed by decree or judgment before an attachment will lie against the nonresident surety. *Holyfield v. State*, 194 Miss. 91, 10 So. 2d 841, 1942 Miss. LEXIS 165 (Miss. 1942).

Where the codicil to a former will transformed the debt of a beneficiary under such will into an advancement, and such codicil was signed by the beneficiary, a subsequent will directing the executors to collect the sum in question as a debt did not operate, without the consent of the beneficiary concerned, to recreate it as a debt on which an attachment in chancery could be founded. *York v. York*, 187 Miss. 465, 193 So. 330, 1940 Miss. LEXIS 223 (Miss. 1940).

Statutory penalties for violating anti-trust law held "indebtedness" within attachments statute. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883, 1921 Miss. LEXIS 46 (Miss. 1921).

A bill is maintainable against a nonresident having property in this state to redress a wrong, even if the damages are unliquidated. *Gordon v. Warfield*, 74 Miss. 553, 21 So. 151, 1896 Miss. LEXIS 158 (Miss. 1896); *Illinois C. R. Co. v. Lucas*, 89 Miss. 411, 42 So. 607, 1906 Miss. LEXIS 64 (Miss. 1906).

A demand for rents by an infant or insane person against a disseizor can be maintained by an attachment in chancery. *Robinson v. Burritt*, 66 Miss. 356, 6 So. 206, 1889 Miss. LEXIS 105 (Miss. 1889).

The complainant need not have a judgment at law. *Comstock v. Rayford*, 9 Miss. 423, 1843 Miss. LEXIS 178 (Miss. 1843); *Zecharie & Kerr v. Bowers*, 11 Miss. 641, 1844 Miss. LEXIS 99 (Miss. 1844), overruled, *Equitable Fire Ins. Co. v. Alexander*, 12 So. 25 (Miss. 1892), overruled, *Dollman v. Moore*, 70 Miss. 267, 12 So. 23, 1892 Miss. LEXIS 84 (Miss. 1892).

6. Property subject to attachment.

The automobile of a nonresident may be attached in an action for damages caused by a collision in which it was involved. *Associates Discount Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535, 1961 Miss. LEXIS 503 (Miss. 1961).

In a suit by attachment in chancery against nonresidents, the seizure of their community automobile gave the plaintiff a lien upon it to satisfy his recovery, and there was no error in subjecting the proceeds from the agreed sale of the car to the satisfaction of plaintiff's recovery. *Vining v. Smith*, 213 Miss. 850, 58 So. 2d 34, 1952 Miss. LEXIS 434 (Miss. 1952).

Land within the state sold by a nonresident defendant is subject to levy if the deed to purchaser has not been filed of record prior to the levy. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633, 1948 Miss. LEXIS 247 (Miss. 1948).

Funds of nonresident prime contractor to become due under contract with the State Highway Commission, which, prior to service of attachment process, in good faith and for purpose of financing performance of the prime contract, had been assigned as security for advances therein, do not constitute such effects of prime contractor as may be reached by attachment process in chancery until they have been or should have been released by the lender to the prime contractor. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Percentages retained by the State Highway Commission under the prime contract are not such "effects" of the nonresident contractor as may be reached by process of attachment in chancery, where so retained under the contract in good faith. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

An attachment will not lie under this section [Code 1942, § 2729] to reach the interests of nonresident members of a partnership in a partnership bank deposit, where the effect of the attachment would be to withdraw from a resident partner the use and control of his interest in the deposit. *S. & W. Const. Co. v. Wood*, 194 Miss. 831, 13 So. 2d 625, 1943 Miss. LEXIS 102 (Miss. 1943).

Indebtedness of an insured to a life insurance company by virtue of a loan on the policy is not an indebtedness subject to attachment within the purview of this section. *Ford v. Mutual Life Ins. Co.*, 194 Miss. 519, 13 So. 2d 45, 1943 Miss. LEXIS 94 (Miss. 1943).

Under contract whereby nonresident mill company was to deliver flour to resident purchaser when purchaser paid draft for purchase price and where payment of draft and passing of title to flour took place simultaneously, "indebtedness" held not to exist from purchaser to mill company which could be reached by claimant for damages against mill company by foreign attachment in chancery. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Existing indebtedness only can be subjected to attachment, but unliquidated damages cannot be so reached. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Funds of non-resident corporations violating anti-trust law are subject to attachment in hands of resident agent, such agent not being entitled to retain the funds of the principal as against the state. *Nugent & Pullen v. Robertson*, 126 Miss. 419, 88 So. 895, 1921 Miss. LEXIS 47 (Miss. 1921).

What "effects" bound in hands of resident defendants stated. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883, 1921 Miss. LEXIS 46 (Miss. 1921).

The personal property of a non-resident defendant can be seized under an attachment in chancery to await final decree only upon affidavit and bond as required by Code 1892 §§ 512 and 513 regulating the right of sequestration. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313, 1905 Miss. LEXIS 27 (Miss. 1905).

The proceeds of such a draft are liable to the consignee for damages resulting from shortage in weight and defective quality of the particular goods represented by the bill of lading, but not for the failure of the consignor to deliver other goods, although they may be included in the one contract of sale. *Exchange Nat'l Bank v. Russell*, 81 Miss. 169, 32 So. 314, 1902 Miss. LEXIS 109 (Miss. 1902).

Where a resident consignee attaches the proceeds of a draft paid by him in the hands of a resident state bank for damages arising out of the consignor's breach of contract, and makes a non-resident national bank, which had bought the draft for the price of the grain consigned, with a bill of lading attached, a defendant, there is no attachment against the national bank within § 5242 Rev. Stat. U. S. 1878, prohibiting an attachment against a national bank or its property. *Russel v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287 (Miss. 1902).

An attachment under this section [Code 1942, § 2729] cannot be maintained if the only property of the non-resident in this state be an unliquidated demand for damages because of a tort committed by a resident defendant. *Blair v. Kansas C., M. & B. R. Co.*, 76 Miss. 478, 24 So. 879, 1898 Miss. LEXIS 110 (Miss. 1898).

An unliquidated liability for damages because of a tort is not subject to garnishment, either at law or in equity. *Gordon v. Warfield*, 74 Miss. 553, 21 So. 151, 1896 Miss. LEXIS 158 (Miss. 1896); *Blair v. Kansas C., M. & B. R. Co.*, 76 Miss. 478, 24 So. 879, 1898 Miss. LEXIS 110 (Miss. 1898).

7. Persons entitled to sue.

Where foreign corporations were doing business in Alabama, Tennessee and Mississippi, the foreign corporations were persons within the meaning of attachment statutes and could sue in the state or be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against. *Snipes v. Commercial & Industrial Bank*, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

Where attachment proceedings in chancery were commenced by the state tax

collector on behalf of the state against non-resident construction companies, wherein it was sought to make a municipality garnishee, to collect excise taxes claimed to be due from the defendant, to which the municipality was alleged to be indebted, a motion by the municipality to dismiss the proceedings as to it should not have been overruled, since the state collector was without authority to bring proceedings on behalf of the state to collect the tax. *City of Natchez v. Craig*, 191 Miss. 567, 3 So. 2d 837, 1941 Miss. LEXIS 170 (Miss. 1941).

One having an equitable interest in a shipment of flour for his profits on the sale thereof, held entitled to attach the proceeds of the sale in the hands of a local bank, where both the buyer and seller are non-residents. *Regina Flour Mills Co. v. Lehmann*, 117 Miss. 575, 78 So. 515, 1918 Miss. LEXIS 199 (Miss. 1918).

So may resident complainants. *Freeman v. Guion*, 19 Miss. 58, 1848 Miss. LEXIS 156 (Miss. 1848).

Non-resident complainants may sue. *Comstock v. Rayford*, 9 Miss. 423, 1843 Miss. LEXIS 178 (Miss. 1843); *Zecharie & Kerr v. Bowers*, 11 Miss. 641, 1844 Miss. LEXIS 99 (Miss. 1844), overruled, *Equitable Fire Ins. Co. v. Alexander*, 12 So. 25 (Miss. 1892), overruled, *Dollman v. Moore*, 70 Miss. 267, 12 So. 23, 1892 Miss. LEXIS 84 (Miss. 1892); *Freeman v. Malcom*, 19 Miss. 53, 1848 Miss. LEXIS 155 (Miss. 1848).

8. Nonresidents.

In a personal injury action against a domesticated foreign corporation, the trial court's exercise of jurisdiction as an attachment in chancery on the grounds of nonresidency did not violate the corporation's right to equal protection of the laws, even though it claimed to be a domestic corporation for all intents and purposes, where the state of incorporation retained, inter alia, supervisory power and the final authority to dissolve the corporation. *Louisville & N. R. Co. v. Hasty*, 360 So. 2d 925, 1978 Miss. LEXIS 2307 (Miss.), cert. denied, 439 U.S. 1003, 99 S. Ct. 614, 58 L. Ed. 2d 679, 1978 U.S. LEXIS 4129 (U.S. 1978).

Foreign railroad corporation with line of railroad within State and property subject

to execution and liable to personal judgment held, nevertheless, "nonresident" within attachment statute. *Clark v. Louisville & N. R. Co.*, 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

"Non-resident" in chancery attachment suit held to include foreign insurance companies which have not become domesticated, notwithstanding that personal judgment may be obtained by service on insurance commissioner. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883, 1921 Miss. LEXIS 46 (Miss. 1921).

9. Persons subject to attachment.

Where, in litigation growing out of death and injuries sustained in a collision of two automobiles filed in the chancery court in the county where letters of administration of the decedent's estate were issued, complainants charged that the accident was due to the negligence of a construction company in obstructing the highway, charged negligence in the operation of his automobile on the part of another defendant, who it was alleged was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, and, upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be reversed in view of Mississippi Constitution § 147. *Mathews v. Thompson*, 231 Miss. 258, 95 So. 2d 438, 1957 Miss. LEXIS 512 (Miss. 1957).

A foreign corporation is a person who may be proceeded against as an individual nonresident debtor, by attachment or otherwise. *Snipes v. Commercial & Industrial Bank*, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

Tendency of the legislature has been to enlarge the right of garnishment against public bodies, such as the State, counties and municipalities, even in law cases. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

State Highway Commission which held money due and owing to highway prime contractor, a non-resident corporation,

could be sued as garnishee in a non-resident attachment in chancery, in suit by subcontractor to recover amount due from prime contractor, where the work was complete and finished and had been inspected and approved by the commission, and the garnishment involved no interruption of work or contest over installment payments or the final payment. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Suit in attachment cannot be maintained against national bank to recover proceeds of warrant delivered to it, and appearance by bank did not vest court with jurisdiction. *National City Bank v. Stupp Bros. Bridge & Iron Co.*, 147 Miss. 747, 113 So. 340, 1927 Miss. LEXIS 351 (Miss. 1927).

A municipality cannot over its objection be proceeded against under the statute so as to bind its indebtedness to a non-resident defendant; and aside from the statute it is not liable to garnishment for debts arising from its exercise of governmental functions. *Dollman v. Moore*, 70 Miss. 267, 12 So. 23, 1892 Miss. LEXIS 84 (Miss. 1892); *Dollar v. Allen West Com. Co.*, 78 Miss. 274, 28 So. 876, 1900 Miss. LEXIS 116 (Miss. 1900); *Clarksdale Compress & Storage Co. v. W. R. Caldwell Co.*, 80 Miss. 343, 31 So. 790, 1902 Miss. LEXIS 254 (Miss. 1902).

A municipal corporation, or its board of school trustees, is not a "person" within the meaning of the statute; but it is intimated that aside from the statute, the court would, under certain circumstances, where its public functions would not be hampered, sustain the garnishment of a municipality. *Dollman v. Moore*, 70 Miss. 267, 12 So. 23, 1892 Miss. LEXIS 84 (Miss. 1892).

10. Procedure.

Procedural rules by which party seeks attachment in chancery are those provided by §§ 11-31-1 et seq., supplemented only by so much of Mississippi Rules of Civil Procedure as may be found not inconsistent with statute. *Universal Computer Services, Inc. v. Lyall*, 464 So. 2d 69, 1985 Miss. LEXIS 1901 (Miss. 1985).

Where chancery court acquired jurisdiction of local defendant under this section

[Code 1942, § 2729], and the nonresident and other local defendants disappeared from the case, leaving no question of equity or chancery procedure therein, the court should not have dismissed the case against the remaining local defendant, but should have transferred it to the circuit court of the county of that defendant's residence, if he so desired. *Ragsdale v. Moore*, 24 So. 2d 332 (Miss. 1946).

In attachments in chancery, garnishee is made defendant in the original cause against the non-resident debtor, and the only duty of the garnishee is to answer whether he is indebted to, or has in his possession effects of, such non-resident debtor, and, if so, to deliver the same to the court if it so ordered for disposition by the court as it may adjudicate to be lawful and equitable. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

In an attachment and garnishment proceeding in chancery, the resident defendant, property in whose hands is sought to be attached as property of a nonresident defendant, is not a "garnishee" in the technical and procedural sense of a garnishee in an attachment at law, and no writ of garnishment should be issued to him. He is simply a defendant with all the rights and privileges as such, and should simply be summoned to answer the suit as any other defendant is summoned. *Gulf Refining Co. v. Mauney*, 191 Miss. 526, 3 So. 2d 844, 1941 Miss. LEXIS 172 (Miss. 1941).

Procedure in suit in chancery against non-resident debtor must be in accord with that of chancery court. *Inman v. Travelers' Ins. Co.*, 153 Miss. 405, 121 So. 107, 1929 Miss. LEXIS 30 (Miss. 1929); *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Complainant not required to give bond before issuance of attachment. *I. B. Rowell & Co. v. Sandifer*, 129 Miss. 167, 91 So. 899, 1922 Miss. LEXIS 32 (Miss. 1922).

11. Pleading.

Non-resident defendant in attachment, not served with summons, will not be heard in his plea to the jurisdiction of the court, to alleged non-ownership of the

property levied upon. *Weaver Grocery Co. v. Cain Milling Co.*, 117 Miss. 781, 78 So. 769, 1918 Miss. LEXIS 221 (Miss. 1918).

12. Parties.

In attachment suit in chancery against nonresident, alleged to own land in this state, for damages arising out of breach of warranty in sale of automobile, person claiming that *lis pendens* notice filed in suit created cloud upon his superior interest in the land may become party to suit on motion for purpose of protecting his interest, and by his appearance in suit intervenor does not waive necessity of issuance and levy of writ of attachment. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

The presence of a resident defendant, in an attachment proceeding in chancery, who was alleged to have in his possession property of a nonresident defendant, was absolutely necessary to enable the complainant to proceed with her suit and to realize on any decree in her favor. *Gulf Refining Co. v. Mauney*, 191 Miss. 526, 3 So. 2d 844, 1941 Miss. LEXIS 172 (Miss. 1941).

The fact that a resident defendant in a chancery attachment proceeding, who was alleged to have property belonging to non-resident defendants, was referred to in the bill as a "garnishee" and not as a defendant, was of no consequence, where such resident defendant appeared and answered. *Gulf Refining Co. v. Mauney*, 191 Miss. 526, 3 So. 2d 844, 1941 Miss. LEXIS 172 (Miss. 1941).

To maintain a proceeding under this section [Code 1942, § 2729] it is necessary to have some resident of the state who has property or effects in his possession or who owes a debt to a nonresident made defendant, and consequently such party is a necessary party to maintain an action under this section. *Clark v. Louisville & N. R. Co.*, 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

13. Judgment.

Defendant who has entered appearance in attachment suit in chancery is subject to judgment upon demand there involved. *Travelers' Ins. Co. v. Inman*, 157 Miss. 810, 126 So. 399, 1930 Miss. LEXIS 237 (Miss. 1930).

If defendant is a non-resident and the res is within the territorial jurisdiction of the court and is brought into court by attachment or garnishment, the court may render a judgment in rem. *Delta Ins. & Realty Co. v. Interstate Fire Ins. Co.*, 113 Miss. 542, 74 So. 420, 1917 Miss. LEXIS 131 (Miss. 1917).

14. —Pro confesso decree.

Chancery court cannot acquire jurisdiction to render a decree pro confesso against non-resident claimant of subject matter of suit. *Delta Ins. & Realty Agency v. Fourth Nat'l Bank*, 137 Miss. 855, 102 So. 846, 1925 Miss. LEXIS 31 (Miss. 1925).

15. —Personal decrees.

Under this section [Code 1942, § 2729] court is authorized to give decree in personam against nonresident defendant on whom summons is personally served in suit by attachment in chancery for damages for breach of warranty arising out of sale of automobile. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

This section [Code 1942, § 2729] is primarily a proceeding in rem to subject nonresidents' property to complainant's demand; and a personal judgment in attachment suit against nonresidents can be rendered only where defendant has been personally served or has entered appearance. *Clark v. Louisville & N. R. Co.*, 158 Miss. 287, 130 So. 302, 1930 Miss. LEXIS 51 (Miss. 1930).

Personal judgment may be rendered against answering non-resident defendant in attachment in chancery. *Branham v. Drew Grocery Co.*, 145 Miss. 627, 111 So. 155, 1927 Miss. LEXIS 149 (Miss. 1927).

Court of equity may, where a nonresident defendant has appeared and answered in the suit, render a personal decree against him for the balance of complainant's debt not realized by sale of the attached property. *John E. Hall Com. Co. v. Foote*, 90 Miss. 422, 43 So. 676, 1907 Miss. LEXIS 87 (Miss. 1907).

A personal decree against a non-resident defendant, under § 486 Code 1892 (Code 1906, § 536), cannot be rendered.

Rothrock Const. Co. v. Port Gibson Mfg. Co., 80 Miss. 517, 32 So. 116, 1902 Miss. LEXIS 298 (Miss. 1902).

16. Res judicata.

A decree determining the merits of a cross bill against a defendant and favorably to a complainant which was a bank of another State was res judicata of such defendant's suit against bank commissioner of such other State under original and supplemental bills alleging facts set up in such cross bill, where court, at time of first suit, had same power sought to be invoked in second suit. *Brock v. Adler*, 180 Miss. 118, 177 So. 523, 1987 Miss. LEXIS 2986 (Miss. 1987).

17. Auxiliary relief.

18. —Injunction.

The complainant may, at the time of filing the bill, upon a sufficient and proper showing for it, obtain an injunction against the transfer or removal of the effects. *Trotter v. White*, 18 Miss. 607, 1848 Miss. LEXIS 143 (Miss. 1848).

19. —Receiver, appointment of.

Receiver under attachment in chancery where resident defendant is about to remit funds to non-resident defendant held proper. *Aetna Ins. Co. v. Robertson*, 131 Miss. 343, 94 So. 7, 1922 Miss. LEXIS 263 (Miss. 1922), writ of error dismissed, 263 U.S. 673, 44 S. Ct. 5, 68 L. Ed. 500, 1923 U.S. LEXIS 2833 (U.S. 1923), cert. denied, 263 U.S. 698, 44 S. Ct. 5, 68 L. Ed. 512, 1923 U.S. LEXIS 2968 (U.S. 1923).

Chancery court may appoint receivers in attachment suits in chancery pendente lite for the property of non-residents. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883, 1921 Miss. LEXIS 46 (Miss. 1921).

20. Damages.

An affidavit in support of an attachment order must include a specific request for damages. A rough estimate of the value in question will not suffice. *Anderson v. Sonat Exploration Co.*, 523 So. 2d 1024, 1988 Miss. LEXIS 193 (Miss. 1988).

21. —Attorney fees, allowance of.

Where the attachment is maliciously brought, attorney's fees cannot be

awarded defendant on dismissal of the bills; not being contemplated by the statute and being recoverable as damages only after judgment in an action for malicious prosecution. *Rosenbaum v. Davis & Andrews Co.*, 111 Miss. 278, 71 So. 388, 1916 Miss. LEXIS 286 (Miss. 1916).

Damages by way of attorneys' fees, etc., may not be allowed in attachments in chancery, as the statute makes no provision therefor. *Bonds v. L. Garvey & Co.*, 87 Miss. 335, 39 So. 492, 1905 Miss. LEXIS 116 (Miss. 1905).

RESEARCH REFERENCES

ALR.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor. 86 A.L.R.5th 527.

Am. Jur.

36 Am. Jur. Proof of Facts 2d 149, Wrongful Attachment.

CJS.

7 C.J.S., Attachment §§ 44 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss L. J. 551, December, 1983.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

§ 11-31-2. Application for order of attachment; determination.

(1) Upon the filing of the bill of complaint, the complainant may apply for an order of attachment by presenting to the chancellor the bill, and an affidavit which shall include the following:

(a) A statement that the action is one described in Section 11-31-1, and is brought against a defendant described in said Section 11-31-1.

(b) A detailed statement of the facts and grounds which entitle the complainant to an order of attachment including a statement of the specific reasons why the complainant's ability to recover the amount of his claim may be endangered or impeded if the order of attachment is not issued.

(c) A statement of the amount the plaintiff seeks to recover.

(d) A statement that the complainant has no information or belief that the claim is discharged in a proceeding under the Federal Bankruptcy Act (11 U.S.C., Section 1, et seq.), or that the prosecution is stayed in a proceeding under the Federal Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment and a statement that the complainant is informed and believes that such property is not exempt from attachment or seizure under Section 85-3-1.

(f) A listing of other persons known to the complainant who may have an interest in the property sought to be attached together with a description of such interest.

(2) The chancellor shall examine the affidavit and bill of complaint and

may, in term time or in vacation, issue an order of attachment with respect to such property under the following conditions:

(a) The chancellor finds that unless the order of attachment is issued, the complainant's ability to recover the amount of his claim may be significantly impaired or impeded.

(b) The chancellor finds that the affidavit establishes a prima facie case demonstrating the complainant's right to recover on his claim against the defendant.

(c) The complainant gives security in an amount satisfactory to the chancellor to abide further orders of the court and to protect the defendant from injury should the action of attachment be judicially determined to have been wrongfully brought.

(3)(a) If such an order of attachment is issued, the defendant shall, upon request, be entitled to an immediate post-seizure hearing to seek dissolution of the order of attachment. Such post-seizure hearing shall have precedence on the docket of the chancery court over all other matters except similar matters previously filed. At such hearing, the chancellor shall order dissolution of the order of attachment unless the complainant establishes by satisfactory proof the grounds upon which the order was issued, including the existence of a claim as described in Section 11-31-1, and the impairment or impediment which a failure to continue the attachment could bring to the complainant's ability to recover the amount of such debt. An appearance by the defendant at the post-seizure hearing shall be considered a special appearance and not a general appearance for purposes of personal jurisdiction over the defendant.

(b) In the alternative, a debtor may regain immediate possession of the property attached by giving security satisfactory to the chancellor in an amount equal to one hundred twenty-five percent (125%) of the value of the property attached or one hundred twenty-five percent (125%) of the amount of the claim, whichever is less.

(c) If the chancellor should determine that the attachment was not brought in good faith, then the chancellor in his discretion may award actual damages (including reasonable attorney's fees) to the defendant.

HISTORY: Laws, 1980, ch. 467, § 1, eff from and after July 1, 1980.

Cross References — Jurisdiction of chancery court, see § 11-31-1.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Validity.

1. In general.

State statute authorizing pre-judgment

ex parte attachment of realty, without bond and absent exigent circumstances, violated due process clause, as applied, since (1) property interests affected were significant, (2) risk of erroneous deprivation of due process was substantial, (3) post-deprivation safeguards did not ad-

equately reduce risk of such error, (4) interests in favor of ex parte attachment were too minimal to obviate need for pre-deprivation hearing, (5) state's substantive interest in protecting rights of plaintiff could not be more weighty than plaintiff's interest, (6) remedy of attachment historically was predicated on some circumstances not here present, and (7) only Connecticut allowed such procedure. *Connecticut v. Doebr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1, 1991 U.S. LEXIS 3317 (U.S. 1991).

An affidavit in support of an attachment order must include a specific request for damages. A rough estimate of the value in question will not suffice. *Anderson v. Sonat Exploration Co.*, 523 So. 2d 1024, 1988 Miss. LEXIS 193 (Miss. 1988).

Attachment should be dissolved, where no substantial impairment or impediment would accrue to insured by failure to maintain attachment over insurance company's property. *Woodmen of World Life Ins. Soc. v. Leitaker*, 703 F. Supp. 1245, 1988 U.S. Dist. LEXIS 15441 (S.D. Miss. 1988).

Mississippi Rule of Civil Procedure 64, regulating procedural aspects of attachment suit, requires that procedural requirements of § 11-31-2 be met. *Universal Computer Services, Inc. v. Lyall*, 464 So. 2d 69, 1985 Miss. LEXIS 1901 (Miss. 1985).

Mississippi Attachment Statute (§§ 11-31-1 et seq.) is not unconstitutional notwithstanding defendant's contentions that (1) it fails to require nexus between property attached and underlying claim, (2) it does not provide for pre-seizure

notice or pre-seizure hearing, (3) it prohibits defendant from making limited appearance to defend his claim to property attached, (4) its bond requirements are unfair and discriminatory as to attached defendant, and (5) it is silent as to future accruing debts. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285, 1985 U.S. Dist. LEXIS 22471 (S.D. Miss. 1985).

2. Validity.

Inclusion of safeguards to minimize the risk of an erroneous pre-hearing deprivation, coupled with the availability of an immediate post-attachment hearing to dissolve the attachment, met the demands of due process; the Mississippi statute required that the complainant set forth the specific facts supporting his claim and permitted an order of attachment to issue only if the chancellor found the complainant had established a prima facie case demonstrating his right to recover on his claim, the Mississippi statute required that the complainant state specific reasons why his ability to recover on his claim was at risk if the order of attachment was not issued, and attachment was only available if the chancellor found that the complainant's ability to recover could be significantly impaired or impeded without an order of attachment, and the Mississippi procedure mandated that the complainant put up a bond to protect the defendant in the event the attachment was later found to have been wrongful. *Performance Drilling Co., LLC v. H & H Welding, LLC*, 2009 U.S. Dist. LEXIS 32190 (S.D. Miss. Apr. 15, 2009).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 191 et seq.

2B Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Form 513 (motion – to dissolve set aside and vacate order granting ex parte attachment).

CJS.

7 C.J.S., Attachment §§ 96, 97, 101 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-3. Attaching property or indebtedness.

When a bill shall be filed for an attachment of the effects of a nonresident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of persons in this state to such nonresident, absent or absconding debtor, it shall be sufficient to bind such effects or indebtedness that the order of attachment together with a copy of the bill of complaint and affidavit be served upon the persons possessing such effects or owing such indebtedness.

HISTORY: Codes, 1880, § 1898; 1892, § 487; 1906, § 537; Hemingway's 1917, § 294; 1930, § 174; 1942, § 2730; Laws, 1980, ch. 467, § 2, eff from and after July 1, 1980.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.
3. Nonresident.
4. Persons entitled.
5. Property subject.
6. Lien.
7. Judgment.

1. In general.

Mississippi Attachment Statute (§§ 11-31-1 et seq.) is not unconstitutional notwithstanding defendant's contentions that (1) it fails to require nexus between property attached and underlying claim, (2) it does not provide for pre-seizure notice or pre-seizure hearing, (3) it prohibits defendant from making limited appearance to defend his claim to property attached, (4) its bond requirements are unfair and discriminatory as to attached defendant, and (5) it is silent as to future accruing debts. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285, 1985 U.S. Dist. LEXIS 22471 (S.D. Miss. 1985).

That Code commissioners moved statute from one chapter to another did not change statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Garnishment statutes held inapplicable to attachments in chancery, except as otherwise provided by statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

Attachment statutes held inapplicable to attachments in chancery except as otherwise provided by statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 1934 Miss. LEXIS 249 (Miss. 1934).

2. Jurisdiction.

Service of a writ of attachment on a railroad's station agent is sufficient to bind the money and effects of the company in his hands at the time. *Illinois C. R. Co. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805, 1963 Miss. LEXIS 486 (Miss. 1963).

Words "persons in this State" mean persons residing in this State, and process on nonresidents temporarily residing in State does not give court jurisdiction over them. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571, 1938 Miss. LEXIS 109 (Miss. 1938).

Chancery court of county in which attachment suit was filed against domestic bank, which bill alleged was domiciled in another county, and foreign bank, to which garnished domestic corporation, domiciled in another county, was alleged to be indebted, to recover amount of check on ground of banks' negligence in collection thereof, had no territorial jurisdiction of domestic bank, between which and garnishee there was neither privity nor connection. *Estes v. Bank of Walnut Grove*, 172 Miss. 499, 159 So. 104, 1935 Miss. LEXIS 107 (Miss. 1935).

Court, by personal service on agent of foreign corporation doing business in this State, acquired jurisdiction of corporation,

garnishee in suit by non-resident employee-creditor, and could require answer and condemn any indebtedness due by corporation to its employee-creditor under employment contract made and performable outside State. *Bean v. Bean*, 166 Miss. 434, 147 So. 306, 1933 Miss. LEXIS 367 (Miss. 1933).

If the garnishee be personally served with process in this state, the court acquires jurisdiction over him and can garnish the debt due the debtor of plaintiff and condemn it, provided the garnishee could himself be sued by his creditors in this state, regardless of the original situs of the debt outside of the state. *Southern P. R. Co. v. A. J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, 1911 Miss. LEXIS 188 (Miss. 1911).

Where complainant fails to show that there was any property belonging to defendant in the hands of the third party when the attachment was served, the court obtained no jurisdiction to entertain the suit and order a statement of accounts. *Louis Werner Sawmill Co. v. Sheffield*, 89 Miss. 12, 42 So. 876, 1906 Miss. LEXIS 91 (Miss. 1906).

An attachment was sued out against a resident debtor and his non-resident vendee of a stock of goods, the bill alleging the sale to be fraudulent and seeking to hold him for their value. The court retained jurisdiction against objection that the vendee's liability, if any, was not such a debt as would support an attachment against him. The Supreme Court declined to pass upon the question because of the inhibition of § 147 of the Constitution. *Barrett v. Carter*, 69 Miss. 593, 13 So. 625, 1891 Miss. LEXIS 137 (Miss. 1891).

3. Nonresident.

Where foreign corporations were doing business in Alabama, Tennessee and Mississippi, the foreign corporations were persons within the meaning of attachment statutes and they themselves could sue in the state and they are liable to be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against. *Snipes v. Commercial & Industrial Bank*, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

One who resides in Mississippi becomes a nonresident thereof, within the meaning of the statute, when he removes therefrom, intending to remain out permanently, or for a definite period of time, although he frequently and continuously visits the state and remains there for short intervals of time, and therefore an attachment against such a person should not be quashed, on the ground that he is a resident. *Bonds v. Ross*, 192 Miss. 610, 7 So. 2d 554, 1942 Miss. LEXIS 65 (Miss. 1942).

Place of its creation ordinarily determines residence of corporation within the meaning of attachment statute; foreign corporations doing business in the state under laws thereof will be deemed "non-resident" within attachment statute. *Central Western Development Co. v. Lewis*, 142 Miss. 428, 107 So. 557, 1926 Miss. LEXIS 100 (Miss. 1926).

4. Persons entitled.

One having an equitable interest in a shipment of flour for his profits on the sale thereof, held entitled to attach the proceeds of the sale in the hands of a local bank, where both the buyer and seller are non-residents. *Regina Flour Mills Co. v. Lehmann*, 117 Miss. 575, 78 So. 515, 1918 Miss. LEXIS 199 (Miss. 1918).

5. Property subject.

Order of attachment issued by chancellor, purporting to bind property, effects, and money in hands of co-defendants owned by or owed to nonresident defendant airplane manufacturer, subjecting any such property or indebtedness now or hereafter owned by or owing to airplane manufacturer to demand of complainant, is impermissible under Mississippi statute and must be modified to bind only that property or indebtedness existing at time writ of attachment was served and any subsequent property or indebtedness owned by or owing to airplane manufacturer up to time respective defendants' answers were filed, or if no answer was filed, until 30 days after service was rendered. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285, 1985 U.S. Dist. LEXIS 22471 (S.D. Miss. 1985).

The automobile of a nonresident may be attached in an action for damages caused

by a collision in which it was involved. *Associates Discount Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535, 1961 Miss. LEXIS 503 (Miss. 1961).

What "effects" bound in hands of resident defendant stated. The word "effects" is broader in signification than the word "goods" and it covers all kinds of personal property. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883, 1921 Miss. LEXIS 46 (Miss. 1921).

Agent may attach property sold for commission but cannot attach property for seller's debt; attachment fails where buyer was garnished after paying purchase money. *Slatter v. P. L. Renoudet Lumber Co.*, 125 Miss. 229, 87 So. 888, 1921 Miss. LEXIS 130 (Miss. 1921).

6. Lien.

The attachment of the property of a nonresident creates a lien which attaches when the writ is served. *Associates Discount Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535, 1961 Miss. LEXIS 503 (Miss. 1961).

Lien exists only when property seized; lien does not relate back to filing of bill. *Slatter v. P. L. Renoudet Lumber Co.*, 125 Miss. 229, 87 So. 888, 1921 Miss. LEXIS 130 (Miss. 1921).

7. Judgment.

A decree determining the merits of a cross bill against a defendant and favorably to a complainant which was a bank of another State was *res judicata* of such defendant's suit against bank commissioner of such other State under original and supplemental bills alleging facts set up in such cross bill, where court, at time of first suit, had same power sought to be invoked in second suit. *Brock v. Adler*, 180 Miss. 118, 177 So. 523, 1987 Miss. LEXIS 2986 (Miss. 1987).

If defendant is a non-resident and the res is within the territorial jurisdiction of the court and is brought into court by attachment or garnishment, the court may render a judgment in rem. *Delta Ins. & Realty Co. v. Interstate Fire Ins. Co.*, 113 Miss. 542, 74 So. 420, 1917 Miss. LEXIS 131 (Miss. 1917).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 191 et seq.

CJS.

7 C.J.S., Attachment §§ 45-49 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-5. Levy on land.

If the land of the nonresident, absent or absconding debtor be the subject of such suit, and an order of attachment be issued, the order shall be levied by the sheriff or other officer as such writs of law are required to be levied on land, and shall have like effect.

HISTORY: Codes, 1880, § 1889; 1892, § 488; 1906, § 538; Hemingway's 1917, § 295; 1930, § 175; 1942, § 2731; Laws, 1980, ch. 467, § 3, eff from and after July 1, 1980.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

In attachment suit in chancery against

land of nonresident, no lien is created until mandatory provisions of Code 1942,

§§ 756, 1904, and this section [Code 1942, § 2731] are complied with by issuance and levy of writ of attachment and filing of notice of levy, and mere filing of lis pen-

dens notice is insufficient to create lien. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

RESEARCH REFERENCES

CJS.

7 C.J.S., Attachment §§ 111 et seq.

Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

Law Reviews.

Symposium on Mississippi Rules of

§ 11-31-7 Writs of sequestration for personal property.

Writs of sequestration may be issued for personal property in such cases as in others.

HISTORY: Codes, 1880, § 1900; 1892, § 489; 1906, § 539; Hemingway's 1917, § 296; 1930, § 176; 1942, § 2732.

Cross References — Writ of sequestration, see § 11-29-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final

Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-9. Publication for appearance of defendant.

The nonresident, absent or absconding debtor shall be made a party to such suit by publication of summons as in other cases, and may appear and plead, demur or answer to the bill without giving security. If such debtor fails to appear, the court shall have power to make any necessary orders to restrain the defendants within this state from paying, conveying away or secreting the debts by them owing, or the effects in their hands belonging to, the nonresident, absent or absconding defendant, and may order such debts to be paid or such effects to be delivered to the complainant on his giving security for the return thereof in such manner as the court may direct.

HISTORY: Codes, 1857, ch. 62, art. 61; 1880, § 1901; 1892, § 490; 1906, § 540; Hemingway's 1917, § 297; 1930, § 177; 1942, § 2733; Laws, 1980, ch. 467, § 4, eff from and after July 1, 1980.

Cross References — Publication of notice in attachment cases, see § 11-33-37 et seq.
Defendant defending suit without replevying property, see § 11-33-81.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Service of process on the station agent of a foreign railroad company is sufficient without publication in a newspaper. *Illinois C. R. Co. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805, 1963 Miss. LEXIS 486 (Miss. 1963).

In an attachment suit brought in a chancery court under Code 1942, § 2729 by an Alabama citizen to recover damages from an Alabama corporation for personal injuries received as a result of a railroad crossing accident in Alabama, and to attach funds or property in the hands of a Mississippi corporation, where the plaintiff did not get process by publication of summons on the nonresident defendant as required by this section, but relied solely on the attempted personal service executed on an employee, who was not such an agent of defendant upon whom process could be served, the chancellor committed reversible error in overruling defendant's motion to dismiss for want of jurisdiction, even though the Mississippi corporation had answered admitting an indebtedness due to the defendant. *Alabama, T. & N. R. Co. v. Howell*, 244 Miss. 157, 141 So. 2d 242, 1962 Miss. LEXIS 433 (Miss. 1962).

Attachment of real property within the state belonging to nonresident automobile owner held to confer jurisdiction to determine rights of the beneficiary of a deed of trust thereon, against a garnished nonresident insurer of the automobile against theft, though the nonresident automobile owner was not served by publication with notice of the suit. *Coahoma County Bank & Trust Co. v. Feinberg*, 241 Miss. 381, 128 So. 2d 562, 1961 Miss. LEXIS 359 (Miss. 1961).

Seizure of automobile of nonresident owner under writ of sequestration to enforce mechanic's lien for labor performed on such automobile, wherein nonresident credit company was described as having

some interest in the subject matter and served by publication, court was without jurisdiction to order a sale of the property, where nonresident debtor had no property in the state or in the hands of residents of the state, there was no showing as to threatened removal, concealment or transfer, and no security was given to abide the further orders of the court for restoring the property to the absent defendant on his appearing and answering the bill within two years. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Nonresident defendants, whose post-office addresses were not shown by proof of publication of notices to them, were not in court, which had no power to render judgment or apply testimony against them. *Sellers v. Powell*, 168 Miss. 682, 152 So. 492, 1934 Miss. LEXIS 379 (Miss. 1934).

In order to maintain an attachment in chancery, the nonresident debtor must be made a party by publication of summons as in other cases, and, therefore, allegation that principal defendant was Louisiana corporation with principal place of business in New Orleans held not to authorize decree pro confesso. *Commercial Credit Co. v. Cook*, 164 Miss. 725, 143 So. 863, 1932 Miss. LEXIS 227 (Miss. 1932).

Statute requiring publication of notices to nonresidents of action against them must be strictly complied with to confer jurisdiction on State court. *Commercial Credit Co. v. Cook*, 164 Miss. 725, 143 So. 863, 1932 Miss. LEXIS 227 (Miss. 1932); *Sellers v. Powell*, 168 Miss. 682, 152 So. 492, 1934 Miss. LEXIS 379 (Miss. 1934).

Appearance of nonresident defendant for sole purpose of removal was not such appearance that when cause was remanded, defendant was in state court without necessity of valid process. *McCoy v. Watson*, 153 Miss. 416, 121 So. 116, 1929 Miss. LEXIS 35 (Miss. 1929).

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final

Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-11. Complainant to give security after decree rendered.

If a decree be rendered in such case without the appearance of the absent debtor, the court, before any proceedings to satisfy said decree, shall require the complainant to give security for abiding such further orders as may be made, for restoring of the estate or effects to the absent defendant, on his appearing and answering the bill within two years; and if the complainant shall not give such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for such time, and shall then be disposed of as the court may direct.

HISTORY: Codes, 1857, ch. 62, art. 62; 1880, § 1902; 1892, § 491; 1906, § 541; Hemingway's 1917, § 298; 1930, § 178; 1942, § 2734.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS**1. In general.**

In attachment suit against absent non-resident debtor, order of court, directing clerk to deliver contents of defendant's safety deposit box to bank, need not provide that this should not be done until security be given for abiding such further orders as may be made for restoring of the estate to the absent defendant, but such security must be required by the clerk under this section [Code 1942, § 2734] before he so delivers the property. *Jackson State Nat'l Bank v. Polk*, 35 So. 2d 430, 1948 Miss. LEXIS 422 (Miss. 1948).

Complainant in suit to enforce mechanic's lien in which nonresident credit company was served by publication was not entitled to have the property sold to satisfy its lien without having given security for abiding such further orders as might be made, for restoring the property to the absent defendant on his appearing and answering the bill within two years. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Seizure of automobile of nonresident owner under writ of sequestration to enforce mechanic's lien for labor performed on such automobile, wherein nonresident credit company was described as having some interest in the subject matter and

served by publication, court was without jurisdiction to order a sale of the property, where nonresident debtor had no property in the state or in the hands of residents of the state, there was no showing as to threatened removal, concealment or transfer, and no security was given to abide the further orders of the court for restoring the property to the absent defendant on his appearing and answering the bill within two years. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44, 15 So. 2d 694, 1943 Miss. LEXIS 135 (Miss. 1943).

Where decree is rendered against non-resident defendant on publication only, without appearance, refunding bond required by this section [Code 1942, § 2734] must be then given before any proceedings to enforce and satisfy decree and sale without it is void. *Seay v. Wofford*, 141 Miss. 888, 106 So. 751, 1926 Miss. LEXIS 443 (Miss. 1926).

Bond not required of complainant before issuance of attachment in chancery. *I. B. Rowell & Co. v. Sandifer*, 129 Miss. 167, 91 So. 899, 1922 Miss. LEXIS 32 (Miss. 1922).

An execution issued before the security required is given is void and sale thereunder passes no title. *Carter v. Brandy*, 71 Miss. 240, 15 So. 790, 1893 Miss. LEXIS 207 (Miss. 1893).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 456, 458 et seq.

CJS.

7 C.J.S., Attachment § 138 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings – Rules 64-71. 52 Miss. L. J. 183, March 1982.

CHAPTER 33.

ATTACHMENT AT LAW AGAINST DEBTORS

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§ 11-33-1. Application.

The remedy by attachment shall apply to all actions or demands founded upon any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and to actions founded upon any penal statutes.

HISTORY: Codes, 1857, ch. 52, art. 1; 1871, § 1419; 1880, § 2414; 1892, § 125; 1906, § 129; Hemingway's 1917, § 121; 1930, § 119; 1942, § 2675.

Cross References — Remedial writs grantable by Supreme Court and circuit judges and chancellors, see § 9-1-19.

Remedial orders in actions in which the right to real or personal property is in controversy, see § 11-7-169.

Proceedings in replevin, attachment, and enforcement of statutory liens before justices of the peace, see § 11-9-135.

Writ of sequestration, see § 11-29-1 et seq.

Attachments against debtors in chancery court, see § 11-31-1 et seq.

Summoning of creditor of judgment debtor in garnishment proceeding, see § 11-35-3.

Authority of an airport authority to attach the equipment of debtors of the authority, see § 61-3-15.

Exemption of income or principal from an employee trust plan, see § 71-1-43.

Attachment of goods covered by negotiable document, see § 75-7-602.

Attachment of collateral subject to security interest, see § 75-9-501.

Exempt personal property, see § 85-3-1.

Nonresident or unknown parties in lien cases, see § 85-7-33.

Apportionment of rent, see § 89-7-9 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

State statute authorizing pre-judgment ex parte attachment of realty, without bond and absent exigent circumstances, violated due process clause, as applied, since (1) property interests affected were significant, (2) risk of erroneous deprivation of due process was substantial, (3) post-deprivation safeguards did not adequately reduce risk of such error, (4) interests in favor of ex parte attachment were too minimal to obviate need for pre-deprivation hearing, (5) state's substantive interest in protecting rights of plaintiff could not be more weighty than plaintiff's interest, (6) remedy of attach-

ment historically was predicated on some circumstances not here present, and (7) only Connecticut allowed such procedure. *Connecticut v. Doeher*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1, 1991 U.S. LEXIS 3317 (U.S. 1991).

The statutory scheme providing for attachment at law against debtors was constitutionally deficient where it made no provision for pre-attachment notice or hearing, where writs of attachment could be authorized by a nonjudicial officer, and where it failed to provide defendants with an immediate post-seizure hearing; as a matter of fairness and justice, sums owed the principal defendant by nonresident

attachment defendants arising out of transactions having no connection with Mississippi would be excluded from garnishment. *Mississippi Chemical Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925, 1977 U.S. Dist. LEXIS 18154 (S.D. Miss. 1977).

Georgia statutes authorizing garnishment of property other than wages in pending suits, but not providing for notice, hearing, or participation by judicial officer, held violative of due process clause of Fourteenth Amendment. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751, 1975 U.S. LEXIS 24 (U.S. 1975).

Where defendant traded to the plaintiff two automobiles he knew to be stolen property and also by bill of sale the defendant expressly warranted the title to the property, and the automobiles, so traded to plaintiffs, were repossessed by the original owners, the obligation was fraudulently contracted and furnished sufficient ground for attachment of defendant's property. *Davis v. Shemper*, 210 Miss. 201, 49 So. 2d 253, 1950 Miss. LEXIS 338 (Miss. 1950).

An attachment will lie for unliquidated damages arising out of a contract. *John E. Hall Com. Co. v. R. L. Crook & Co.*, 87 Miss. 445, 40 So. 20, 1905 Miss. LEXIS 99 (Miss. 1905).

Where a foreign corporation sold grain to a domestic partnership and delivered grain of a quality inferior to that contracted for, the purchaser's demand for damages became due immediately upon the delivery of the grain and the payment

of the agreed price, and hence the purchaser was entitled to sue out an attachment at that time. *John E. Hall Com. Co. v. R. L. Crook & Co.*, 87 Miss. 445, 40 So. 20, 1905 Miss. LEXIS 99 (Miss. 1905).

Wherever assumpsit will lie for the breach of an implied contract the case is within the statute. *Nethery v. Belden*, 66 Miss. 490, 6 So. 464, 1889 Miss. LEXIS 134 (Miss. 1889).

Whenever assumpsit will lie for the breach of an implied contract, attachments may be maintained to recover damages therefor, although the breach of the contract may be tortious. *Nethery v. Belden*, 66 Miss. 490, 6 So. 464, 1889 Miss. LEXIS 134 (Miss. 1889).

An attachment will lie to recover for a breach of warranty. *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 1887 Miss. LEXIS 6 (Miss. 1887).

A county can sue out an attachment. *State use of Lawrence County v. Fortinberry*, 54 Miss. 316, 1877 Miss. LEXIS 4 (Miss. 1877).

The attachment law applies to transactions occurring before its adoption as well as afterward. *Green v. Anderson & Hilzheim*, 39 Miss. 359, 1860 Miss. LEXIS 58 (Miss. 1860).

The remedy does not extend to actions ex delicto. *J. B. Fellows & Co. v. Brown*, 38 Miss. 541, 1860 Miss. LEXIS 24 (Miss. 1860).

In order to entitle a party to an attachment, he must have a present subsisting debt or demand; a mere surety cannot attach. *Henderson, Terry & Co. v. Thornton*, 37 Miss. 448, 1859 Miss. LEXIS 36 (Miss. 1859).

RESEARCH REFERENCES

ALR.

What is an action for "debt" within attachment or garnishment statute. 12 A.L.R.2d 787.

Attachment in alienation of affections or criminal conversation case. 67 A.L.R.2d 527.

Reformation of deed or mortgage as against intervening rights of attaching judgment creditor. 79 A.L.R.2d 1180.

Right of judgment creditor to demand that debtor's tender of payment be in cash

or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution. 83 A.L.R.3d 598.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and

like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

CJS.

7 C.J.S., Attachment §§ 16 et seq.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 31, 32, 35 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 1 et seq.

2 Am. Jur. Proof of Facts, Attachment, Proof No. 1 (wrongful attachment).

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings-Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-33-3. Suit against one or more debtors among joint debtors.

The creditor may sue out an attachment against one or more of joint debtors or joint and several debtors, whether primarily or secondarily liable, without affecting his rights as against the others.

HISTORY: Codes, 1892, § 126; 1906, § 130; Hemingway's 1917, § 122; 1930, § 120; 1942, § 2676.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

An indorser of a note cannot in an action against himself and the maker, in which an attachment has been issued on the ground of nonresidence, file a plea in abatement setting up that the maker was a resident when the attachment was issued. *Timberlake v. Thayer*, 16 So. 878 (Miss. 1895).

This section [Code 1942, § 2676] is useless except to declare the law as existing

independently of it. *Cohen v. Gamble*, 71 Miss. 478, 15 So. 236, 1893 Miss. LEXIS 103 (Miss. 1893).

The attachment may be against one debtor and the declaration in the cause be against several, provided the debt owing by the debtors not attached be due when the declaration is filed against them. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229, 1889 Miss. LEXIS 113 (Miss. 1889).

RESEARCH REFERENCES

ALR.

Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor. 86 A.L.R.5th 527.

CJS.

7 C.J.S., Attachment §§ 25, 26, 266-269.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment § 168.

§ 11-33-5. Attachment against partners.

In case one or more partners shall be liable to attachment on any of the enumerated grounds therefor, save the first, an attachment may be main-

tained against said partner, or all of the partners, by the partnership creditors. The property of the partnership, in either case, may be levied on and dealt with in all respects as if the grounds of attachment existed as to all the partners. The effects levied upon may be replevied by the partners sued by giving bond as other defendants in attachments, or, if they fail to do so, any partner not sued therein may replevy the same in like manner; but, by doing so, such partner shall thereby become a party defendant to the suit for all purposes, and judgment may be rendered on his bond against the obligors therein as in other attachment cases.

HISTORY: Codes, 1892, § 127; 1906, § 131; Hemingway's 1917, § 123; 1930, § 121; 1942, § 2677.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

An attachment may be maintained by firm creditors against all members of a partnership on removal of one partner out of state. *American Oil Co. v. H. Booth Lumber Co.*, 137 Miss. 404, 102 So. 262, 1924 Miss. LEXIS 220 (Miss. 1924).

Where one or more of the partners reside in this state, attachment cannot be sustained on ground of nonresidence. *Barney & Hines v. Moore-Haggerty Lumber Co.*, 95 Miss. 118, 48 So. 232, 1909 Miss. LEXIS 199 (Miss. 1909).

This section [Code 1942, § 2677] is an enabling act and does not abridge any right; hence it does not hinder a creditor of a partnership from attaching on the ground of nonresidence the property of any member of the partnership, the right to do so existing by virtue of Code 1892, § 2353 (Code 1906 § 2683). *Cohen v. Gamble*, 71 Miss. 478, 15 So. 236, 1893 Miss. LEXIS 103 (Miss. 1893).

RESEARCH REFERENCES

ALR.

Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence. 9 A.L.R.2d 471.

CJS.

7 C.J.S., Attachment § 51.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 168, 185.

§ 11-33-7. Attachments against nonresidents jointly indebted.

When two or more persons, not residing in this state, are jointly indebted, the writ of attachment may be issued against such debtors, or any of them, by their proper names or by the name of the partnership, or by whatever other names such debtors may be called or known in this state, or against the executors or administrators of them or any or either of them, and may be levied upon the separate or joint estate or both of such debtors, and the lands, tenements, money, goods, chattels, effects, rights and credits of such debtors,

or any or either of them, which shall be liable to be seized and taken for the satisfaction of any debt or demand for which an attachment will lie.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (12); 1857, ch. 52, art. 5; 1871, § 1431; 1880, § 2420; 1892, § 128; 1906, § 132; Hemingway's 1917, § 124; 1930, § 122; 1942, § 2678.

Cross References — Attachments in chancery court, see § 11-31-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR. nishment on ground of nonresidence. 9
Residence of partnership for purposes of A.L.R.2d 471.
statutes authorizing attachment or gar-

§ 11-33-9. Grounds for attachment—affidavit.

The creditor, his agent or attorney, shall make oath before a judge of the supreme court, a judge of a circuit court, or a chancellor, or before a clerk of the circuit court or chancery court or the deputy of such clerk, or any justice court judge, or the mayor of any city, town or village, of the amount of his debt or demand, to the best of his knowledge and belief, and shall also make oath, to the best of his knowledge and belief, to one or more of the following grounds for attachment:

- (1) That the defendant is a foreign corporation, or a nonresident of this state; or
- (2) That he has removed, or is about to remove, himself or his property out of this state; or
- (3) That he so absconds or conceals himself that he cannot be served with a summons; or
- (4) That he contracted the debt or incurred the obligation in conducting the business of a ship, steamboat or other watercraft in some of the navigable waters of this state; or
- (5) That he has property or rights in action which he conceals, and unjustly refuses to apply to the payment of his debts; or
- (6) That he has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with the intent to defraud his creditors; or
- (7) That he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors; or
- (8) That he fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought; or
- (9) That he is buying, selling, or dealing in, or has, within six (6) months next before the suing out of the attachment, directly or indirectly bought, sold, or dealt in future contracts, commonly called "futures"; or
- (10) That he is in default for public money, due from him as a principal, to the state, or some county, city, town, or village thereof; or

(11) That defendant is a banker, banking company or corporation, and received deposits of money knowing at the time he or it was insolvent; or has made or published a false or fraudulent statement as to his or its financial condition; or

(12) That a judgment lien under Title 93, Mississippi Code of 1972, has been enrolled against said obligor for nonpayment of an order for support as defined by Section 93-11-101, Mississippi Code of 1972, as amended.

HISTORY: Codes, Hutchinson's 1848, ch. 56 art. 4 (6); 1857, ch. 52, art. 2; 1871, §§ 1420 et seq; 1880, § 2413; 1892, § 129; 1906, § 133; Hemingway's 1917, § 125; 1930, § 123; 1942, § 2679; Laws, 1997, ch. 588, § 132, eff from and after July 1, 1997.

Cross References — Remedial writs grantable by supreme and circuit judges and chancellors, see § 9-1-19.

Powers of county judge to issue writs, see § 9-9-23.

Creditors attacking fraudulent conveyances, see § 11-5-75.

Removals of public officers generally, see § 25-5-1 et seq.

Rights of creditors in cases of assignment for the benefit of creditors, see § 85-1-11 et seq.

Disposal of exempt property, see § 85-3-49.

Enforceable and unenforceable future contracts, see §§ 87-1-9 through 87-1-27.

Dealing in futures, see §§ 87-1-31, 87-1-33.

Receiving deposits when bank is insolvent, see § 97-19-47.

Penalty for receiving deposits when bank is insolvent, see § 97-19-47.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Affidavit generally.
2. —Where, and before whom, made.
3. —By agent.
4. —Failure to sign.
5. —Amendability.
6. Transfers while insolvent.
7. Defendant a foreign corporation, or nonresident.
8. Removal, or impending removal of property from state.
9. Concealment of property.
10. Assignment or disposal of property with intent to defraud creditors.
11. Fraudulently contracted debt for which suit is about to be brought.
12. Dealing in futures.
13. Miscellaneous.

1. Affidavit generally.

But an affidavit which stated the second ground for attachment in the disjunctive in the language of the statute, was not

defective. *Helton v. McLeod & Dantzler*, 93 Miss. 516, 46 So. 534, 1908 Miss. LEXIS 89 (Miss. 1908).

Whether a paper, in form of an affidavit, is really one is not determinable by what either of the parties considered in reference to it, but by the inquiry whether anything was done which could properly be construed as taking or administering an oath. *Carlisle v. Gunn*, 68 Miss. 243, 8 So. 743, 1890 Miss. LEXIS 63 (Miss. 1890).

It is erroneous to state several causes for attachment in the affidavit disjunctively. *Bishop Bros. v. Fennerty*, 46 Miss. 570, 1872 Miss. LEXIS 26 (Miss. 1872).

An affidavit which recites the reasons of affiant's belief of the existence of the grounds of attachment is not because of the recitals invalid. *Spear v. King*, 14 Miss. 276, 1846 Miss. LEXIS 64 (Miss. 1846).

It is unnecessary for the affidavit to be in the exact language of the statute; sub-

stantial compliance is sufficient. *Wallis v. Wallace*, 7 Miss. 254, 1842 Miss. LEXIS 30 (Miss. 1842).

2. —Where, and before whom, made.

The clerk of the circuit court of one county is authorized under this section [Code 1942, § 2679], and § 134, Code 1906, to take affidavit, approve bond, and issue a writ in attachment, returnable to the circuit court of another county. *Meridian Fertilizer Factory v. Edwards*, 77 Miss. 697, 27 So. 645 (Miss. 1900).

An affidavit made before, and a writ issued by one who, though ineligible to an appointment as deputy because of minority, acts as deputy circuit clerk and is generally recognized by the public as such, is not void, he being a *de facto* officer. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905, 1894 Miss. LEXIS 121 (Miss. 1894).

The affidavit may be made in another state and before a commissioner for this state; the statute does not require that the writ of attachment shall be issued by the officer before whom the affidavit is made. *Griffing v. Mills*, 40 Miss. 611, 1866 Miss. LEXIS 102 (Miss. 1866).

3. —By agent.

It is unnecessary for the agent who makes the affidavit to affirm therein that he is agent; the certificate of the officer to that effect is sufficient evidence of the fact. *Lindner v. Aaron & Nelson*, 6 Miss. 581, 1841 Miss. LEXIS 40 (Miss. 1841).

4. —Failure to sign.

A creditor asked a justice of the peace to prepare papers for an attachment against his debtor, telling him the amount of the debt and the grounds of attachment; the justice wrote an affidavit, bond, and writ, and handed them to him, asking "If that was all right," and the creditor answered that it was. The affidavit was not signed, and the oath was not administered or attempted to be administered. Held: There was no affidavit, and the levy based thereon was invalid, and a subsequent amendment could not validate the proceedings so as to affect intervening rights. *Carlisle v. Gunn*, 68 Miss. 243, 8 So. 743, 1890 Miss. LEXIS 63 (Miss. 1890).

The affidavit is not invalid because not signed by the affiant. *Redus v. Wofford*, 12 Miss. 579, 1845 Miss. LEXIS 35 (Miss. 1845).

5. —Amendability.

Affidavit for attachment may be amended on motion to quash writ. *Greenwood Grocery Co. v. Bennett*, 101 Miss. 573, 58 So. 482, 1912 Miss. LEXIS 13 (Miss. 1912); *McSwain v. Cephus*, 109 Miss. 368, 69 So. 178, 1915 Miss. LEXIS 166 (Miss. 1915).

The trial court may permit an amendment so as to allege fully the grounds for attachment, which were only alleged in part in the original affidavit. *Helton v. McLeod & Dantzler*, 93 Miss. 516, 46 So. 534, 1908 Miss. LEXIS 89 (Miss. 1908).

Where the affidavit and writ allege a debt due but the declaration is for a debt in part not due, plaintiff is entitled to amend the affidavit and writ by inserting the amount not due and dismissing as to the part due, the ground of attachment being applicable to either. *Dalsheimer v. McDaniel*, 69 Miss. 339, 12 So. 338, 1891 Miss. LEXIS 112 (Miss. 1891); *Weissinger v. Studebaker Bros. Mfg. Co.*, 73 Miss. 480, 18 So. 915, 1895 Miss. LEXIS 106 (Miss. 1895).

6. Transfers while insolvent.

The insolvent debtor, just as the solvent debtor, may honestly prosecute his business in the usual and ordinary methods, and is open to attachment only when his conduct makes him subject thereto on some one or more of the specific grounds enumerated in the statute. *Weissinger v. Studebaker Bros. Mfg. Co.*, 73 Miss. 480, 18 So. 915, 1895 Miss. LEXIS 106 (Miss. 1895).

This provision does not preclude a debtor in insolvent or failing circumstances from giving a preference to one or more of his creditors if it be *bona fide* and with no intent to secure a benefit for himself. *Fitzpatrick v. Flannagan*, 106 U.S. 648, 1 S. Ct. 369, 27 L. Ed. 211, 1882 U.S. LEXIS 1598 (U.S. 1882).

7. Defendant a foreign corporation, or nonresident.

Evidence, including a showing that defendant had been in and out of the state

since 1951, had moved his wife and family to Colorado, and purchased a home in that state, and had told a number of persons that he intended to move to Colorado, was sufficient to justify a finding that defendant was either a nonresident or was about to remove himself or his property out of the state. *Dickson v. Lindsay*, 234 Miss. 684, 107 So. 2d 732, 1958 Miss. LEXIS 539 (Miss. 1958).

A nonresident creditor may maintain attachment within the state against nonresident debtor. *Hunt v. Gardner*, 147 Miss. 374, 112 So. 7, 1927 Miss. LEXIS 281 (Miss. 1927).

The fact that a citizen of the state moves his wife and children out of the state, together with certain exempt property, but himself remains in the state with no intention of abandoning his residence here, does not constitute him a nonresident. *Carr-Lowry Lumber Co. v. Martin*, 144 Miss. 106, 109 So. 849, 1926 Miss. LEXIS 362 (Miss. 1926).

A nonresident creditor may attach a debt, due by a nonresident of this state to a person in this state, in another state, although the debt is payable in Mississippi, where garnishment is authorized upon attachment proceedings in such foreign state, and the debtor resides in such state and is served with process under the laws of such state. *McPherson v. Matthews*, 143 Miss. 299, 108 So. 494, 1926 Miss. LEXIS 267 (Miss. 1926).

One indebted to a nonresident cannot place money on deposit in a bank in defiance of his creditor's wishes, for the purpose of conferring jurisdiction in attachment upon the court where the bank is located. *Saxony Mills v. Wagner & Co.*, 94 Miss. 233, 47 So. 899, 1908 Miss. LEXIS 32 (Miss. 1908).

A person is a nonresident if he is out of the state and intends to remain out of it for an indefinite period, although he may make temporary visits here and may intend to permanently return at some uncertain future time. *Imperial Cotton Oil Co. v. Allen*, 83 Miss. 27, 35 So. 216, 1903 Miss. LEXIS 8 (Miss. 1903).

A creditor of a nonresident corporation which has been consolidated into a new nonresident one may attach the new corporation at law and garnish a debt to the

old company which has been transferred to the new one. *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 So. 723, 1901 Miss. LEXIS 75 (Miss. 1901).

Since to authorize an attachment on the ground of nonresidence the debt must be due, a plea in abatement that it was not due when suit was begun, is sufficient. *Stadder v. Jacobs*, 70 Miss. 429, 12 So. 444 (Miss. 1892).

One residing here, though having a domicile in another state, is not liable to attachment as a nonresident. *Brown v. Crane*, 69 Miss. 678, 13 So. 855, 1892 Miss. LEXIS 52 (Miss. 1892).

The test of one's nonresidence is whether the absence is of such character and so prolonged that he cannot be served with ordinary process. *Morgan v. Nunes*, 54 Miss. 308, 1877 Miss. LEXIS 2 (Miss. 1877).

Domicil and residence are not convertible terms, and one having a domicile in this state may yet be a nonresident in the meaning of the law. *Alston v. Newcomer & Kausler*, 42 Miss. 186, 1868 Miss. LEXIS 48 (Miss. 1868).

8. Removal, or impending removal of property from state.

Ordinary business or pleasure trips outside of the state by a resident domiciled in the state, openly made, are not within the contemplation of the statute as grounds for attachment. *Shelton v. Kindred*, 279 So. 2d 642, 1973 Miss. LEXIS 1487 (Miss. 1973).

The mere fact that a professional interstate truckdriver had accepted employment with a firm of interstate haulers based outside of Mississippi and that he would be required by his employment to travel about the country, without more, was wholly insufficient to justify the seizure of his property by attachment. *Shelton v. Kindred*, 279 So. 2d 642, 1973 Miss. LEXIS 1487 (Miss. 1973).

Evidence, including a showing that defendant had been in and out of the state since 1951, had moved his wife and family to Colorado, and purchased a home in that state, and had told a number of persons that he intended to move to Colorado, was sufficient to justify a finding that defendant was either a nonresident or was

about to remove himself or his property out of the state. *Dickson v. Lindsay*, 234 Miss. 684, 107 So. 2d 732, 1958 Miss. LEXIS 539 (Miss. 1958).

A citizen may remove exempt property out of the state or dispose of it without subjecting himself to attachment. *Carr-Lowry Lumber Co. v. Martin*, 144 Miss. 106, 109 So. 849, 1926 Miss. LEXIS 362 (Miss. 1926).

Under paragraph 2, 1906 Code, § 133, a defendant has removed himself out of this state and is therefore liable to an attachment for debt when he is absent from the state with no definite intention of returning thereto. *American Oil Co. v. H. Booth Lumber Co.*, 137 Miss. 404, 102 So. 262, 1924 Miss. LEXIS 220 (Miss. 1924).

Where an attachment is sued out against a nonresident of this state, and no personal summons is served on such nonresident or his agent, but publication is depended upon for service, a judgment cannot be rendered at the return term, and if one is entered it is void and will be reversed upon appeal. *Copiah Hardware Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375, 1924 Miss. LEXIS 127 (Miss. 1924).

Mere absence from the state, coupled with the fact that the creditor does not know where the defendant is, does not authorize attachment against the defendant, if process may be served under the provisions of Code 1906 § 3926. To authorize attachment because of removal from the state, or absence from domicil, there must be an inability to serve the summons in the manner provided by law to obtain the jurisdiction of the person, and the burden of proof is on the attaching creditor to show this. *Collier v. Chamblee*, 136 Miss. 257, 101 So. 372, 1924 Miss. LEXIS 125 (Miss. 1924); *Dent v. Jones & Pintard*, 50 Miss. 265, 1874 Miss. LEXIS 54 (Miss. 1874); *Morgan v. Nunes*, 54 Miss. 308, 1877 Miss. LEXIS 2 (Miss. 1877); *Bowers v. Ross*, 55 Miss. 213, 1877 Miss. LEXIS 127 (Miss. 1877).

Evidence held insufficient to show that a merchant was about "to remove himself or his property out of this state." *Bamberger v. Merchants' & Farmers' Bank*, 73 Miss. 572, 19 So. 296, 1895 Miss. LEXIS 162 (Miss. 1895).

A debtor going from this state expecting to return and leaving sufficient property accessible to creditors to pay his debts, may take money with him without subjecting himself to attachment. *Philadelphia Inv. Co. v. Bowling*, 72 Miss. 565, 17 So. 231, 1895 Miss. LEXIS 6 (Miss. 1895).

But if his sole property in this state consists of money and he takes it with him, though expecting to return, he may be attached, as money is subject to execution or attachment under § 3968 Code 1906. *Philadelphia Inv. Co. v. Bowling*, 72 Miss. 565, 17 So. 231, 1895 Miss. LEXIS 6 (Miss. 1895).

The shipment by an insolvent debtor of cotton to a commission merchant in another state, to create a fund to be drawn against in payment of such other debts as he might elect to pay other than his debt to the assignee, is a removal of property out of the state within the meaning of the statute. *Crow v. Lemon & Gale Co.*, 69 Miss. 799, 11 So. 110, 1892 Miss. LEXIS 5 (Miss. 1892).

Under the statute subjecting to attachment one who "has removed or is about to remove his property out of the state," a merchant though insolvent who ships cotton to his commission merchant in another state, for sale to pay a debt exceeding the value of the cotton, is not liable to attachment. *Lowenstein v. Bew*, 68 Miss. 265, 8 So. 674, 1890 Miss. LEXIS 58 (Miss. 1890).

To sustain an attachment on the ground that the debtor has removed, or is about to remove, his property out of the state, it is sufficient for the plaintiff to show that the defendant has removed, or is about to remove, any of his property out of the state; and then it devolves on the defendant to show, if he can, that he has other ample, visible property to satisfy all claims against him unless such facts appear from the plaintiff's evidence. *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250, 1887 Miss. LEXIS 111 (Miss. 1887).

If a defendant have remaining in the state, and which he is not about to remove, ample property to satisfy, and which is liable to his debts, then the mere removal of some other property from the state will not subject him to attachment. *Montague v. Gaddis*, 37 Miss. 453, 1859

Miss. LEXIS 37 (Miss. 1859); *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250, 1887 Miss. LEXIS 111 (Miss. 1887).

9. Concealment of property.

There must be both concealment and unjust refusal to apply to debts to justify attachment. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Concealment of property is ground for attachment, regardless of whether successful. *Gray v. Valley*, 136 Miss. 886, 101 So. 855, 1924 Miss. LEXIS 186 (Miss. 1924).

In attachment, evidence of bank deposits in assumed name sufficient for submission to jury of question of whether defendant had property which he had concealed and unjustly refused to apply to payment of debts. *Gray v. Valley*, 136 Miss. 886, 101 So. 855, 1924 Miss. LEXIS 186 (Miss. 1924).

A judgment on an attachment writ reciting that defendant unjustly refused to apply his property to the payment of his debts, is not invalid because of a variance between it and the affidavit, which alleged that defendant had property which he concealed and unjustly refused to apply to the payment of his debts. *Brown v. Williams-Brooke Co.*, 106 Miss. 187, 63 So. 351, 1913 Miss. LEXIS 121 (Miss. 1913).

Where an affidavit in attachment assigned as a ground that defendant had property or rights of action which he concealed or refused to apply on his debts, and the testimony shows that he had an office in the county where suit was brought, and had property there and spent a large part of his time in said county, the court should have granted a peremptory instruction for defendant. *Smith v. Corporation of Oxford*, 91 Miss. 651, 45 So. 365, 1907 Miss. LEXIS 176 (Miss. 1907).

10. Assignment or disposal of property with intent to defraud creditors.

A writ of attachment on the ground that defendant had assigned or disposed of his property or is about to assign or dispose of his property or rights in action, with intent to defraud his creditors, was not

sustained by the evidence tending to show that the defendant was running a saw-mill, and that he shipped his lumber out of the state, and that he owed plaintiff, but had not paid him, and defendant was entitled to a verdict on the attachment issue. *Terry v. Jolly*, 115 Miss. 26, 75 So. 756, 1917 Miss. LEXIS 179 (Miss. 1917).

Certain evidence held admissible on the question of genuineness of a debt preferred in an alleged fraudulent assignment. *English v. Friedman*, 70 Miss. 457, 12 So. 252, 1892 Miss. LEXIS 112 (Miss. 1892).

To sustain an attachment on the ground of the fraudulent disposition of property, the plaintiff may rest on evidence which shows such disposition, in case the defendant owns no other property; the ownership of other and (ample) property, liable to his debts, must be shown by defendant, unless it appear from the plaintiff's evidence. *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250, 1887 Miss. LEXIS 111 (Miss. 1887).

If the purpose to remove exist, and may be carried out in one, two, three, or several weeks or months, though the debtor's movements be not characterized by fright, speed, or haste, he is liable to attachment, if the object be to defeat, defraud or delay creditors. *Myers v. Farrell*, 47 Miss. 281, 1872 Miss. LEXIS 75 (Miss. 1872).

11. Fraudulently contracted debt for which suit is about to be brought.

Where defendant traded to the plaintiff two automobiles he knew to be stolen property and also by bill of sale the defendant expressly warranted the title to the property, and the automobiles, so traded to plaintiffs, were repossessed by the original owners, the obligation was fraudulently contracted and furnished sufficient ground for attachment of defendant's property. *Davis v. Shemper*, 210 Miss. 201, 49 So. 2d 253, 1950 Miss. LEXIS 338 (Miss. 1950).

Intent to defraud must exist when debt is created for attachment on such ground. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

A false warranty, knowingly made, is evidence of a fraudulent contraction of the

debt. *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 1887 Miss. LEXIS 6 (Miss. 1887).

Although the defendant commit a felony in contracting the debt sued for, to sustain the attachment it must be shown that in so doing he intended to defraud the plaintiff. The statute defining the felony in this case was intended for the protection of the public. *Hughes v. Lake*, 63 Miss. 552, 1886 Miss. LEXIS 137 (Miss. 1886).

A purpose to defraud at the time is necessary in order to constitute the fraudulent contraction of the debt. *Marqueze v. Sontheimer*, 59 Miss. 430, 1882 Miss. LEXIS 130 (Miss. 1882).

12. Dealing in futures.

Where defendant made two purchases of "futures" for an undisclosed principal, one with his principal's money and one with his own, plaintiff was entitled to a peremptory instruction that the attachment was rightfully sued out. *Dillard v. Brenner*, 73 Miss. 130, 18 So. 933, 1895 Miss. LEXIS 119 (Miss. 1895).

13. Miscellaneous.

Where, as to a writ of garnishment issued to nonresident express company doing business in the state, the garnishee had the right to raise legal question as to jurisdiction of the court and also the reasonableness of its refusal to answer certain questions, the action of the trial court in striking out the answer of the garnishee and rendering judgment against him without first ordering a hearing, and ordering the garnishee to answer the questions and then to give it ample time within which to do so, was reversible error. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29, 1951 Miss. LEXIS 422 (Miss. 1951).

Where buyer of fishing equipment, resident of Mississippi, leased equipment to Louisiana fishermen, buyer could not enjoin unpaid seller in Mississippi from prosecuting attachment suit in Louisiana, notwithstanding Louisiana procedure might deprive buyer of exemption, since buyer, by consummating removal of equipment to Louisiana, deprived seller of right

to seize equipment in Mississippi under purchase-money statute or on ground of imminent removal from State. *E. J. Platte Fisheries v. Wadford*, 170 Miss. 617, 155 So. 161, 1934 Miss. LEXIS 139 (Miss. 1934).

Grounds of attachment authorized by statute must be proven. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Instruction in attachment suit that "if plaintiff has failed to prove any of said grounds," it is the duty of the jury to find for defendant, the word "any" is synonymous with "either". *Carr-Lowry Lumber Co. v. Martin*, 144 Miss. 106, 109 So. 849, 1926 Miss. LEXIS 362 (Miss. 1926).

Where the evidence wholly fails to sustain any one of the grounds of attachment, it is error to refuse a peremptory instruction for defendant. *Pinola Lumber Co. v. Husbands*, 118 Miss. 229, 79 So. 69, 1918 Miss. LEXIS 58 (Miss. 1918).

Declaration can be amended so as to increase the amount of indebtedness claimed after trial of the attachment issue. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166, 1915 Miss. LEXIS 141 (Miss. 1915).

Although for want of a plea in abatement judgment is rendered for plaintiff on the attachment, yet if the issue as to indebtedness is decided for defendant, this is conclusive evidence that the attachment was wrongfully sued out and defendant has a right of action for damages on the attachment bond. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (Miss. 1893).

Unless the question is one of defendant's estoppel to deny the ground of the attachment, plaintiff's belief, though induced by the conduct and language of the defendant as to the defendant's solvency, or the truth of the grounds of attachment, is immaterial. *Stadler v. Jacobs*, 70 Miss. 429, 12 So. 444 (Miss. 1892).

Where cause for attachment is shown for only a part of the debt, and the court has no jurisdiction of so small an amount as that part, the whole attachment must fail. *Delmas Bros. v. Morrison*, 61 Miss. 314, 1883 Miss. LEXIS 128 (Miss. 1883).

RESEARCH REFERENCES

ALR.

Sufficiency of affidavit for attachment, respecting fraud or intent to defraud, as against objection that it is a mere legal conclusion. 8 A.L.R.2d 578.

CJS.

7 C.J.S., Attachment §§ 121, 122 et seq., 145.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 149, 155, 185.

§ 11-33-11. Bond.

The creditor, his agent, or attorney, shall also give bond, with a sufficient surety or sureties, to be approved by the officer issuing the attachment, in double the sum for which the complaint is made payable to the defendant and conditioned to the effect following, to wit:

“The condition of the above obligation is that, whereas, the above bound _____ prays an attachment against the estate of The said _____ for the sum of _____ dollars, returnable to the _____ court of _____, on the _____ day of _____ next:

“Now, if the plaintiff shall pay to the defendant all such damages as he shall sustain by the wrongful suing out of the attachment, and all costs which may be awarded against the plaintiff in said suit, then the obligation shall be void.”

The bond, together with the affidavit for the attachment, shall be returned by the officer taking the same to the court to which the attachment is returnable.

HISTORY: Codes, Hutchinson’s 1848, ch. 56, art. 4 (8, 14); 1857, ch. 52, art. 6; 1871, § 1425; 1880, § 2416; 1892, § 130; 1906, § 134; Hemingway’s 1917, § 126; 1930, § 124; 1942, § 2680.

Cross References — Posting bond before attachment of perishable commodities, see § 11-1-43.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sufficiency of bond.
3. Damages recoverable.

1. In general.

State statute authorizing pre-judgment ex parte attachment of realty, without bond and absent exigent circumstances, violated due process clause, as applied,

since (1) property interests affected were significant, (2) risk of erroneous deprivation of due process was substantial, (3) post-deprivation safeguards did not adequately reduce risk of such error, (4) interests in favor of ex parte attachment were too minimal to obviate need for pre-deprivation hearing, (5) state’s substantive interest in protecting rights of plaintiff could not be more weighty than plaintiff’s interest, (6) remedy of attach-

ment historically was predicated on some circumstances not here present, and (7) only Connecticut allowed such procedure. *Connecticut v. Doebr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1, 1991 U.S. LEXIS 3317 (U.S. 1991).

The state has the right to file an action for the collection of unpaid privilege taxes and penalties thereon due the state and its political subdivisions by the use of the statutory remedy of an attachment at law without the giving of an attachment bond provided for by this section. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362, 1958 Miss. LEXIS 323 (Miss. 1958).

Execution and approval of bond are essential to a valid attachment in the Circuit Court. *Williams v. Thigpen*, 217 Miss. 683, 64 So. 2d 765, 1953 Miss. LEXIS 479 (Miss. 1953).

Only liability of attaching creditors and sureties on attachment bond was for wrongful suing out of attachment and alone to defendant therein. *Jamison v. Wilson*, 152 Miss. 382, 119 So. 800, 1928 Miss. LEXIS 267 (Miss. 1928).

A judgment rendered by a justice of the peace on a bond is divisible, and when appellant dismisses his case against the surety, a perfectly valid judgment still remains against the principal. *Ott v. McElveen*, 102 Miss. 139, 58 So. 709, 1911 Miss. LEXIS 185 (Miss. 1911).

The clerk of the circuit court of one county is authorized under this section [Code 1942, § 2680], and Code 1906, §§ 133, 134, to take affidavit, approve bond, and issue a writ in attachment, returnable to the circuit court of another county. *Meridian Fertilizer Factory v. Edwards*, 77 Miss. 697, 27 So. 645 (Miss. 1900).

If defendant prevails on the debt issue, it is conclusive evidence that the attachment was wrongfully sued out, although for want of a plea in abatement judgment had been entered for plaintiff on the attachment, and defendant has a right of action for damages on the attachment bond. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (Miss. 1893).

2. Sufficiency of bond.

In case of the execution of bond by the

officers of a corporation for their company, the presumption is that the instrument has been rightly executed. *Saunders v. Columbus Life & General Ins. Co.*, 43 Miss. 583, 1870 Miss. LEXIS 69 (Miss. 1870).

A bond executed by the usee in the suit is good. *Grand G. R. & B. Co. v. Conger*, 17 Miss. 505, 1848 Miss. LEXIS 34 (Miss. 1848).

A bond executed by an agent, binding himself personally and not his principal, is sufficient. *Frost v. Cook*, 8 Miss. 357, 1843 Miss. LEXIS 99 (Miss. 1843); *Page v. Ford*, 10 Miss. 266, 1844 Miss. LEXIS 144 (Miss. 1844).

A bond signed by one partner, who acts for himself and as agent for his partners in suing out the attachment is sufficient, though not signed by the other members of the firm. *Wallis v. Wallace*, 7 Miss. 254, 1842 Miss. LEXIS 30 (Miss. 1842).

3. Damages recoverable.

In such case, as defeating the debt also defeats the attachment, attorney's fees are allowable. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (Miss. 1893).

Actual damages are recoverable on an attachment bond, and counsel fees are embraced. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (Miss. 1893).

Where no property of defendant was attached, but judgment nil dicit was rendered against him on the attachment, he cannot, upon defeating plaintiff on the issue of indebtedness, recover on the attachment bond for attorneys' fees and expenses incurred in defense of the action of assumpsit against him. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (Miss. 1893).

Where attachment proceedings, though based upon an affidavit and bond appropriate to a distress for rent, proceed thereafter, and are treated by both parties as an ordinary attachment, and the landlord fails in such attachment, the tenant, although not entitled to double damages, may recover on the bond for actual damages. *Hawkins v. James*, 69 Miss. 361, 11 So. 654, 1891 Miss. LEXIS 99 (Miss. 1891).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 456- 458 et seq.

Bonds, 2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 351 et seq.

CJS.

7 C.J.S., Attachment § 138 et seq.

§ 11-33-13. Bond by an agent.

If the bond purport to be executed by an agent or attorney of the attaching creditor, it shall be prima facie evidence that the agent or attorney had due authority to act.

HISTORY: Codes, 1871, § 1426; 1880, § 2417; 1892, § 131; 1906, § 135; Hemingway's 1917, § 127; 1930, § 125; 1942, § 2681.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-15. Bond excepted to: new bond and affidavit.

When it shall appear to the court, on exceptions taken by the defendant or otherwise, that the sureties on any attachment bond are insufficient, the court shall direct the plaintiff to give a new bond with sufficient surety; and such bond shall be as valid, in all respects, as the original bond. If the plaintiff fail to give a new bond within the time required by the court, the attachment shall be dismissed. In all cases where an attachment bond or affidavit may be defective in any respect, or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond, which shall be, in all respects, as valid and binding as if given at the commencement of the suit.

HISTORY: Codes, 1857, ch. 52, art. 15; 1871, § 1483; 1880, § 2464; 1892, § 132; 1906, § 136; Hemingway's 1917, § 128; 1930, § 126; 1942, § 2682.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where the affidavit and writ alleged a debt due, but the declaration was for a debt in part not due, plaintiff was entitled to amend the affidavit and writ by inserting the amount not due and dismissing as to the part due, the grounds of attachment being applicable to either. *Dalsheimer v. McDaniel*, 69 Miss. 339, 12 So. 338, 1891 Miss. LEXIS 112 (Miss. 1891); *Weissinger v. Studebaker Bros. Mfg. Co.*, 73 Miss. 480, 18 So. 915, 1895 Miss. LEXIS 106 (Miss. 1895).

Leave to amend the affidavit and writ so as to show a debt not due is properly denied, and a motion to quash properly sustained, where the attachment was for a debt past due and issued in one county returnable before the circuit court of another, and it does not appear that defendant resided or last resided, or that his property was found in the former county, and the declaration shows that the only part of the debt past due when the attachment was issued, was below the jurisdiction of the circuit court. *Yale v. McDaniel*,

69 Miss. 337, 12 So. 556, 1891 Miss. LEXIS 116 (Miss. 1891).

An attachment proceeding will not be quashed, where an application is made to amend the affidavit, because neither the officer nor the affiant signed the affidavit; it being shown that the affidavit was in fact sworn to, and both parties thought everything necessary to be done had been done, and their failure to sign was by mere inadvertence; and this too, even though the affiant did not "hold up his hand and swear." (The report of this case omits to state, what is shown by the record, that an application to amend was made.) *Dunlap v. Clay*, 65 Miss. 454, 4 So. 118, 1888 Miss. LEXIS 19 (Miss. 1888).

A bond signed by sureties in a partnership name may be amended by allowing each partner to sign his own name. *Boisseau & Martenez v. Kahn*, 62 Miss. 757, 1885 Miss. LEXIS 138 (Miss. 1885).

The jurat to an affidavit may be amended by allowing the officer to subscribe his name to it. *Boisseau & Mar-*

tenez v. Kahn, 62 Miss. 757, 1885 Miss. LEXIS 138 (Miss. 1885).

A bond executed by a single surety, who was incapacitated to become such, is amendable. *Field, Morris & Fenner v. McKinney*, 60 Miss. 763, 1883 Miss. LEXIS 11 (Miss. 1883).

Under this provision, which expressly authorizes amendments, a defective affidavit for attachment may be amended by adding a new ground for the attachment. *Fitzpatrick v. Flannagan*, 106 U.S. 648, 1 S. Ct. 369, 27 L. Ed. 211, 1882 U.S. LEXIS 1598 (U.S. 1882).

Mere irregularities in the bond must be availed of by exceptions taken by the defendant; a claimant, or the surety on his bond, cannot object to the attachment proceedings on account thereof. *Atkinson v. Foxworth*, 53 Miss. 741, 1876 Miss. LEXIS 143 (Miss. 1876).

The amendment of an affidavit in attachment does not affect the lien of the writ. *Griffing v. Mills*, 40 Miss. 611, 1866 Miss. LEXIS 102 (Miss. 1866).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 372 et seq.

CJS.

7 C.J.S., Attachment § 138 et seq.

§ 11-33-17. The writ.

On affidavit being made and bond given, the officer approving the bond shall issue one or more writs of attachment against the estate of the debtor, directed to the sheriff, or any other proper officer of the county or counties in which the defendant shall have property or debts, and shall be returnable to the next term of the circuit court of any county, or to the justice court of any county, in cases within the jurisdiction of the justice court, in which the defendant or property or debts of the defendant may be found and shall be the leading process of the suit.

HISTORY: Codes, 1857, ch. 52, art. 3; 1871, § 1428; 1880, § 2418; 1892, § 133; 1906, § 137; Hemingway's 1917, § 129; 1930, § 127; 1942, § 2683; Laws, 1981, ch. 471, § 34; Laws, 1982, ch. 423, § 28.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Form of writ, see § 11-33-19.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The fact that an attachment bond was not marked approved by circuit clerk until day after affidavit and attachment was made and writ was issued and levied was not sufficient to justify the quashing of the attachment, where the bond met with clerk's approval as good and sufficient and he called it to the attention of the sheriff as affording protection to him in the execution of writ then delivered to the executing officer. *Small v. Sturgis Lumber Co.*, 216 Miss. 515, 62 So. 2d 765, 1953 Miss. LEXIS 662 (Miss. 1953).

Code 1906 §§ 3079, 3080, so far as applicable, may be used by the claimant of property, where the contest is between him and the seller thereof, the same as if suit arose in attachment. *Quillin v. Paine*, 94 Miss. 696, 47 So. 898, 1909 Miss. LEXIS 332 (Miss. 1909).

The clerk of the circuit court of one county is authorized under this section [Code 1942, § 2683], to take affidavit, approve bond, and issue a writ in attachment, returnable to the circuit court of another county. *Meridian Fertilizer Factory v. Edwards*, 77 Miss. 697, 27 So. 645 (Miss. 1900).

A justice cannot specially deputize a private person to execute a writ of attachment in another county. *Miller v. Edwards*, 75 Miss. 739, 23 So. 426, 1898 Miss. LEXIS 19 (Miss. 1898).

An attachment suit by consent of parties may be transferred by change of venue from the circuit court of one county to that of another. *Weissinger v. Mansur & Tibbetts Implement Co.*, 75 Miss. 64, 21 So. 757 (Miss. 1897).

Where there is no levy upon property or garnishment in the county where the action is brought, although an alias writ of attachment has been served as a summons upon defendant in another county where he resides, the court is without jurisdiction. *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844, 1896 Miss. LEXIS 112 (Miss. 1896).

The venue of actions in personam is "in the county in which the defendant or any of them may be found." *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844, 1896 Miss. LEXIS 112 (Miss. 1896).

A writ of attachment issued by one as deputy, who though by reason of minority is ineligible to appointment, acts as deputy and is generally recognized by the public as such, is not void as he is a de facto officer. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905, 1894 Miss. LEXIS 121 (Miss. 1894).

Where a deputy clerk issues an attachment in the name of the clerk without affixing his name as deputy, the writ is not void. At most, this is only an irregularity and is amendable. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905, 1894 Miss. LEXIS 121 (Miss. 1894).

Where a writ of attachment, issued by a justice of the peace in one district, is returnable to a justice's court to be held at a designated place in another district, and the parties appear at the place to which the writ is returnable, and try the case before a justice of the peace other than the one who issued the writ, the judgment is valid; and on appeal to the circuit court in such case, the certificate of the justice who tried the case that the affidavit and bond are a part of the record in the case in his court, obviates all objections to them on the ground that they were not executed before him. *Armitage v. Rector, Ratliff & Co.*, 62 Miss. 600, 1885 Miss. LEXIS 118 (Miss. 1885).

The proper court of the county of a garnishee's residence has jurisdiction of an attachment against a defendant to whom he is indebted, although the defendant be a householder and resident of another county. *Barnett v. Ring*, 55 Miss. 97, 1877 Miss. LEXIS 111 (Miss. 1877); *Smith v. Mulhern*, 57 Miss. 591, 1880 Miss. LEXIS 7 (Miss. 1880); *Baum v. Burnes*, 66 Miss. 124, 5 So. 697, 1888 Miss. LEXIS 75 (Miss. 1888).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 235- 245, 277 et seq.

Writ, warrant, or order of attachment, 2 Am. Jur. Pl and Pr Forms (Rev ed), Attachment and Garnishment, Forms 31 et seq.

CJS.

7 C.J.S., Attachment §§ 130, 158, 210-227, 257-260, 339-344.

§ 11-33-19. Form of the writ.

The writ shall be in the form or to the effect following, to wit:

“THE STATE OF MISSISSIPPI

“To the sheriff or any constable of _____ county, greeting:

“Whereas, AB (or agent or attorney of AB) hath complained on oath to _____ one of the judges of the Supreme Court (or other officer as the case may be) that CD is justly indebted to the said AB to the amount of _____ and that the said CD is a nonresident, etc. (reciting the affidavit) and bond and security having been given according to the statute:

“We therefore command you that you attach the said CD by his estate, real and personal, in your county to the value of the said demand and costs of suit, and that you safely keep the same according to law, so as to compel the said CD to appear before the _____ court (or before the court of _____, a justice court judge of _____ county), to be held at _____, in and for the county of _____, on the _____ Monday of _____, to answer the above complaint. And that you summon the said CD, if to be found in your county, to appear and answer accordingly; and have there then this writ, with your proceedings thereon.

“Witness my hand, this _____ day of _____, A.D. _____.”

The writ shall be signed by the officer granting the same or, if issued by a clerk or his deputy, shall be dated, signed and sealed as other writs; and an attachment shall not be quashed or abated for want of form if the substantial matters expressed in the foregoing precedent be contained therein; and on the demand of the plaintiff said writ may embody a garnishment.

HISTORY: Codes, 1857, ch. 52, art. 6; 1871, § 1429; 1880, § 2419; 1892, § 134; 1906, § 138; Hemingway's 1917, § 130; 1930, § 128; 1942, § 2684; Laws, 1981, ch. 471, § 35; Laws, 1982, ch. 423, § 28; Laws, 1986, ch. 459, § 24, eff from and after July 1, 1986.

Cross References — Writ, generally, see § 11-33-17.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where plaintiff sues out attachment against defendant and suggests that A has property in his possession belonging to

defendant, and A answers that he has no control over the property and does not know whether it belongs to defendant, but that it is in a building which he leased

defendant, whereupon an order is made that A surrender the property to the sheriff this is not a garnishment, and does not bar the rightful owner of the right to assert her title thereto. *Minshew v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315, 1905 Miss. LEXIS 29 (Miss. 1905).

The fact that a writ of attachment addressed to any officer of the county in which the writ was issued was served in another county by an officer of that county, to which officer it was not addressed, does

not affect the validity of the service. *Hawkins & Co. v. McAlister*, 86 Miss. 84, 38 So. 225, 1905 Miss. LEXIS 13 (Miss. 1905).

Under this section [Code 1892, § 134] and the section following [Code 1892, § 135], officers issuing attachments may embody a writ of garnishment therein and may issue duplicate and alias writs of attachment and garnishment. *C. C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (Miss. 1893).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 237, 240, 242, 249 et seq.

State and federal forms, 2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 87, 88.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Form 87, 88.

CJS.

7 C.J.S., Attachment §§ 217, 218 et seq.

§ 11-33-21. Duplicate and alias writs.

The officer granting an attachment may issue duplicate writs to any other county in which the defendant may have property or debts due him, which writs shall be returnable to the court to which the original is returnable, and shall be executed and returned in like manner. Where the attachment has not been executed, or where no property has been found, or not sufficient to satisfy the debt, or where the plaintiff desires to garnish other persons, the clerk of the court to which same is returnable may issue alias writs to the same or other counties without a renewal bond or affidavit.

HISTORY: Codes, 1857, ch. 52, art. 16; 1871, § 1432; 1880, § 2421; 1892, § 135; 1906, § 139; *Hemingway's* 1917, § 131; 1930, § 129; 1942, § 2685.

Cross References — Alias and pluries summons and testatum writ, see § 13-3-15. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Defects in the proceedings by which an attachment writ was sued out and served will not justify a dismissal of the suit on the debt nor deprive the plaintiff of the right to amend and sue out alias process. *Foote v. John E. Hall Com. Co.*, 84 Miss. 445, 36 So. 533, 1904 Miss. LEXIS 62 (Miss. 1904).

Under this section [Code 1892, § 135] and the section preceding [Code 1892, § 134], officers issuing attachments may

embody a writ of garnishment therein and may issue duplicate and alias writs of attachment and garnishment. *C. C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (Miss. 1893).

The service of an alias attachment writ, returnable to a court, will give the court jurisdiction. *Barnett v. Ring*, 55 Miss. 97, 1877 Miss. LEXIS 111 (Miss. 1877).

It is not required that the duplicate writs should have indorsed thereon that they are duplicates. *Saunders v. Colum-*

bus Life & General Ins. Co., 43 Miss. 583,
1870 Miss. LEXIS 69 (Miss. 1870).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 242-244.

CJS.

7 C.J.S., Attachment §§ 247-253.

§ 11-33-23. Writ to be served, on what, and what bound by the levy.

The officer receiving the writ of attachment shall forthwith levy the same, according to law, on the property of the defendant, real and personal, wherever found; and he shall summon as garnishees, by writs of garnishment, to be issued and served by himself, and duly returned, all persons indebted to the defendant, or having in possession effects belonging to him, to appear at the court to which the attachment is returnable, there to answer as required by law; and he shall seize the books of accounts and other evidence of debt belonging to the defendant and levy on the stock, shares, or interest of the defendant in any corporation, joint-stock company, or copartnership. All the property, debts, choses in action, stock, shares, and interest of the defendant attached, shall be bound by the levy from the date thereof.

HISTORY: Codes, 1857, ch. 52, art. 4; 1871, § 1434; 1880, § 2423; 1892, § 136; 1906, § 140; Hemingway's 1917, § 132; 1930, § 130; 1942, § 2686.

Cross References — Summoning of creditor of judgment debtor in garnishment proceeding, see § 11-35-3.

When bond of indemnity is required, see § 13-3-157.

Refusal to give aid to sheriff, see § 19-25-67.

Exemption of income or principal from an employee trust plan, see § 71-1-43.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general; assignment.
2. Claimant.
3. Effect of levy.
4. Garnishment.
5. Nonresident.
6. Persons entitled.

1. In general; assignment.

In case of a general assignment, where previous attachments have been levied, the property should be sold by the assignee-receiver, free from the lien of the attachments, and the proceeds applied by the court to the payment of the attaching

creditors. *Weems v. Love Mfg. Co.*, 74 Miss. 831, 21 So. 915, 1897 Miss. LEXIS 65 (Miss. 1897).

2. Claimant.

Code 1906 § 4990, so far as applicable, may be used by the claimant of property, where the contest is between him and the seller thereof, the same as if suit arose in attachment. *Quillin v. Paine*, 94 Miss. 696, 47 So. 898, 1909 Miss. LEXIS 332 (Miss. 1909).

Personal property seized in attachment and delivered to a claimant under a forthcoming bond is no longer in custodia legis and is subject to execution or attachment

by creditors of the claimant. *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769, 1895 Miss. LEXIS 30 (Miss. 1895).

3. Effect of levy.

A levy on lands to which defendant held a bond for title after he had assigned the same to another does not bind the land although the creditor was without notice, actual or constructive, of the assignment. *MacRae v. Goodbar*, 80 Miss. 315, 31 So. 812, 1902 Miss. LEXIS 260 (Miss. 1902).

Whatever may be true of the validity of the levy, a junior creditor cannot question it, unless he has procured such a levy upon the property in his own case as will give him precedence. *Scharff v. Chaffe*, 68 Miss. 641, 9 So. 897, 1891 Miss. LEXIS 28 (Miss. 1891).

The seizure of the books of accounts and the choses in action creates no lien; this can be acquired only by service of notice on the garnishees. *Boone v. McIntosh*, 62 Miss. 744, 1885 Miss. LEXIS 135 (Miss. 1885).

4. Garnishment.

Where a garnishee is served and fails to answer, judgment against the garnishee will depend upon the validity of the judgment against the defendant, and if such judgment is not authorized the judgment against the garnishee will be reversed on appeal. *Copiah Hardware Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375, 1924 Miss. LEXIS 127 (Miss. 1924).

Under this section [Code 1942, § 2686], the officer receiving a writ of attachment with no suggestion contained in it of garnishment may summon as garnishees persons whose names may be suggested to him. The section supplements, but does not supersede, the power of officers under §§ 138, 139 Code 1892 to issue attachment and garnishment writs. *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904, 1894 Miss. LEXIS 120 (Miss. 1894).

Where a writ embodies a garnishment, as it may under Code 1930, § 128, but the sheriff instead of summoning the garnishees thereunder, issues and serves an independent writ of garnishment under this section, the latter writ, though unneces-

sary, is not invalid. *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904, 1894 Miss. LEXIS 120 (Miss. 1894).

As to garnishments, the purpose of this section [Code 1942, § 2686] was to give a supplemental writ to be issued by the officer having the original in his hands for service, for the purpose of supplying a deficiency in the original and not to take away the right of the officer issuing the attachment writ to embody garnishment writs therein. *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904, 1894 Miss. LEXIS 120 (Miss. 1894).

A suggestion in the writ that a certain person is indebted to the defendant makes it the duty of the officer to summon that person as garnishee, even though the writ contains no direct command that he do so. *Semmes v. Patterson*, 65 Miss. 6, 3 So. 35, 1887 Miss. LEXIS 3 (Miss. 1887).

5. Nonresident.

By attachment of nonresident's shares in resident corporation, court acquired jurisdiction to render decree against nonresident condemning shares for sale to satisfy indebtedness. *Grenada Bank v. Glass*, 150 Miss. 164, 116 So. 740, 1928 Miss. LEXIS 142 (Miss. 1928).

Nonresident defendant will not be heard, on his plea to the jurisdiction of the court, to allege nonownership of the property levied upon. *Weaver Grocery Co. v. Cain Milling Co.*, 117 Miss. 781, 78 So. 769, 1918 Miss. LEXIS 221 (Miss. 1918).

Where in a suit in attachment and for an accounting, complainant fails to show that there was any property belonging to the defendant in the hands of the third party when the attachment was served, the court obtained no jurisdiction to entertain the suit and order an accounting. *Louis Werner Sawmill Co. v. Sheffield*, 89 Miss. 12, 42 So. 876, 1906 Miss. LEXIS 91 (Miss. 1906).

6. Persons entitled.

A creditor of a nonresident corporation which has been consolidated into a new nonresident one, may attach the new corporation at law and garnish a debt to the old company which has been transferred to the new one. *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 So. 723, 1901 Miss. LEXIS 75 (Miss. 1901).

A sheriff holding an attachment writ against a corporation incurs no liability to plaintiff for refusing to levy it on the property of the individuals composing it and managing its affairs. State use of Owen v. Marshall, 69 Miss. 486, 13 So. 668, 1891 Miss. LEXIS 141 (Miss. 1891).

This is true even if it can be shown that if the levy had been made the property might thereafter have been subjected in a chancery proceeding to the demand of plaintiff. State use of Owen v. Marshall, 69 Miss. 486, 13 So. 668, 1891 Miss. LEXIS 141 (Miss. 1891).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 249- 257.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.

CJS.

7 C.J.S., Attachment §§ 265 et seq.

§ 11-33-25. The defendant to be summoned.

The officer serving the attachment shall summon the defendant, if to be found, to appear and answer the action, as in other cases.

HISTORY: Codes, 1880, § 2423; 1892, § 137; 1906, § 141; Hemingway's 1917, § 133; 1930, § 131; 1942, § 2687.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 317, 488- 491.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.

§ 11-33-27. Proceeding when levy by other than sheriff.

If a writ of attachment, returnable to the circuit court, be served by a constable, marshal, or by any person specially appointed for that purpose, the writ of attachment with the return thereon of the action of such person and all property and effects levied on, shall forthwith be delivered to the sheriff of the proper county, who shall be responsible for the property so seized, and shall return the writ to the proper court, with a statement of his action under it; but if the sheriff be a party, the office serving the attachment shall make the return, and so state therein, and likewise retain the property, unless the court, or judge in vacation, make an order for the safekeeping and forthcoming thereof.

HISTORY: Codes, 1871, § 1437; 1880, § 2426; 1892, § 138; 1906, § 142; Hemingway's 1917, § 134; 1930, § 132; 1942, § 2688; Laws, 1986, ch. 459, § 25, eff from and after July 1, 1986.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where a writ of attachment is returned served by one not an officer of the court, it is error to refuse to issue an alias writ on plaintiff's request, and to dismiss the entire suit, but the attachment should be kept alive by the issuance of the alias, and if no personal service of the summons has been had, an alias summons should also be issued. *Foote v. John E. Hall Com. Co.*, 84 Miss. 445, 36 So. 533, 1904 Miss. LEXIS 62 (Miss. 1904).

A circuit court has no jurisdiction of an

attachment returned by a constable where the record does not show that he ever delivered the writ to the sheriff with his return or that claimants bonded the property. *Tishomingo Sav. Inst. v. Allen*, 76 Miss. 114, 23 So. 305, 1898 Miss. LEXIS 52 (Miss. 1898).

The circuit court has no jurisdiction of an attachment returned by a constable unless the sheriff be a party. *Tucker v. Byars*, 46 Miss. 549, 1872 Miss. LEXIS 24 (Miss. 1872); *Barnett v. Ring*, 55 Miss. 97, 1877 Miss. LEXIS 111 (Miss. 1877).

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.

§ 11-33-29. Attachment may be issued and served on Sunday.

Attachments may in all cases be issued and executed on Sunday; and may be executed in any part of the county, by any constable of the county, or by the constable or any police officer of any municipality, in the same manner as the sheriff of the county. In cases of emergency, and when a sheriff or his deputy, or a constable or police officer cannot be had in time, the officer issuing an attachment may appoint some reputable person to execute such attachment; and such officer shall be liable on his bond and individually for the consequence of appointing an insolvent or incompetent person for such service.

HISTORY: Codes, 1857, ch. 52, art. 40; 1871, § 1433; 1880, § 2471; 1892, § 139; 1906, § 143; Hemingway's 1917, § 135; 1930, § 133; 1942, § 2689.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 251, 253.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.

CJS.

7 C.J.S., Attachment §§ 266-269.

§ 11-33-31. Return of writ and bonds.

The officer serving an attachment shall make a full return thereon of all his proceedings, on or before the return day of the writ. He shall deliver to the court or clerk all bonds which he may have taken pursuant to law.

HISTORY: Codes, 1857, ch. 52, art. 6; 1871, § 1436; 1880, § 2425; 1892, § 140; 1906, § 144; Hemingway's 1917, § 136; 1930, § 134; 1942, § 2690.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

It cannot be presumed that the officer levied upon any property other than that

enumerated in his return on the writ. Phillips v. Harvey, 50 Miss. 489, 1874 Miss. LEXIS 81 (Miss. 1874).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 277- 287.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 171 et seq.

CJS.

7 C.J.S., Attachment §§ 339, 340 et seq.

§ 11-33-33. Ancillary attachment.

When a suit shall have been commenced, the plaintiff may obtain an attachment against the defendant, or one or more of them, on making affidavit and giving bond as required in other cases of attachment, which attachment shall be granted, issued, executed, and returned by the same officers; and the like proceedings as far as applicable, shall be had thereon as in other cases. The affidavit, bond, and writ, when returned, shall be filed with the papers in the original suit, which shall not be delayed thereby.

HISTORY: Codes, 1857, ch. 52, art. 13; 1871, § 1482; 1880, § 2461; 1892, § 141; 1906, § 145; Hemingway's 1917, § 137; 1930, § 135; 1942, § 2691.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-35. Attachment for debt not due.

When any creditor whose debt is not due, shall make affidavit of any of the last six grounds for an attachment, or that he has just cause to suspect, and verily believes, that his debtor will remove himself or his effects out of the state before said debt will become payable, with intent to hinder, delay, or defraud his creditors, or that he hath removed, with like intent, leaving property in this state, and shall give bond as in other cases, he may obtain an attachment returnable to the county where the debtor resides, or last resided, or where his property may be found. Such attachment shall be issued, executed, and returned, and the like proceedings had thereon as in other cases of attachment.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (20); 1857, ch. 52, art. 12; 1871, § 1455; 1880, § 2459; 1892, § 142; 1906, § 146; Hemingway's 1917, § 138; 1930, § 136; 1942, § 2692.

Cross References — Bond to discharge attachment for a debt not due, see

§ 11-33-63.

Judgment in case in which debt is not due, see § 11-33-93.

Debt of garnishee which is not due, see § 11-35-35.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where an attachment is sued out in the county where the debtor resides and his property is found, the affidavit and writ alleging a debt due, but the declaration being for a debt in part not due, plaintiff is

entitled to amend the affidavit and writ as to show that the attachment was for a debt not due, and to dismiss as to the part due. *Dalsheimer v. McDaniel*, 69 Miss. 339, 12 So. 338, 1891 Miss. LEXIS 112 (Miss. 1891).

RESEARCH REFERENCES

ALR.

Claim, obligation, or liability within contemplation of statute providing for attachment, or giving right of action for indemnity, before debt or liability is due. 58 A.L.R.2d 1451.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 11, 33, 34.

§ 11-33-37. Publication of notice.

When any writ of attachment shall be executed and returned, if the defendant be not summoned, the clerk of the court shall cause a notice to be published once a week for three weeks in some newspaper published within the county, or in some convenient county, and having a circulation in the county in which the suit is pending, stating the issuance of such attachment, at whose suit, against whose estate, for what sum, and in what court the same is pending and that unless the defendant appear on the first day of the next succeeding term of court and plead to said action, judgment will be entered, and the estate attached will be sold. Such publication may be made before or after the return term of court, but in cases of attachment against persons residing out of this state, the creditor, his agent or attorney, shall file with the clerk his affidavit-if the affidavit for the attachment do not contain such statement-showing the post office of the defendant, or that he has made diligent inquiry to ascertain it without success; and if the post office shall be stated, the clerk shall send by mail to such defendant, at his post office, a copy of such notice, and shall make it appear to the court that he has done so, before judgment shall be rendered on publication of notice; and for a failure of duty in this respect, the clerk may be punished as for contempt.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (15); 1857, ch. 52, art. 19; 1871, §§ 1472 et seq; 1880, § 2437; 1892, § 143; 1906, § 147; Hemingway's 1917, § 139; 1930, § 137; 1942, § 2693.

Cross References — Attachment against nonresidents, see § 11-31-9.

Applicability of provisions of this section to procedures for disposition of property seized in connection with violations of the Uniform Controlled Substances Law

(§ 41-29-101 et seq.), see § 41-29-177.

Procedure for forfeiture of property seized for violation of fish and game laws, see § 49-7-251 et seq.

Service by publication in forfeiture proceeding under alcoholic beverage control law, see § 67-1-93.

Service by publication, in proceeding for forfeiture of vehicle used in drive-by shooting, to be made as provided in this section, see § 97-3-111.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The fact that service of process by publication, published four times at weekly intervals, in a suit by an attachment at law on the ground of nonresidence to collect an indebtedness, had not been completed for at least five days before the term of court, at which it was returnable, convened, did not render void the judgment rendered. *Stevens v. Barbour*, 193 Miss. 109, 8 So. 2d 242, 1942 Miss. LEXIS 98 (Miss. 1942).

When affidavit for attachment is upon ground of nonresidence of defendant, officer executing attachment writ is not required to make effort to summon defendant. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717, 1934 Miss. LEXIS 132 (Miss. 1934).

Claimant of funds in attachment proceedings has burden of proving improper service alleged to render judgment against attachment debtor invalid. *Piqua Sav. Bank v. Copiah Hardware Co.*, 146 Miss. 581, 111 So. 836, 1927 Miss. LEXIS 225 (Miss. 1927).

Where an attachment is sued out against a nonresident of this state, and no personal summons is served on such nonresident or his agent, but publication is depended upon for service, a judgment cannot be rendered at the return term, and if one is entered it is void and will be reversed upon appeal. *Copiah Hardware Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375, 1924 Miss. LEXIS 127 (Miss. 1924).

It is not necessary that the clerk of the court mail a copy of the notice to a resident defendant. This notice is only required to be mailed when the suit is against persons residing outside of the state. *H.O. & C.A. Thompson v. J. C.*

Camors & Co., 126 Miss. 772, 89 So. 649, 1921 Miss. LEXIS 78 (Miss. 1921).

Whether the creditor, his agent or attorney filed an affidavit showing the postoffice of the defendant or that he had made diligent inquiry to ascertain it without success, cannot be inquired into in a collateral attack on the judgment rendered. *Cotton v. Harlan*, 124 Miss. 691, 87 So. 152, 1920 Miss. LEXIS 558 (Miss. 1920); *Thompson v. J. C. Camors & Co.*, 126 Miss. 772, 89 So. 649, 1921 Miss. LEXIS 78 (Miss. 1921).

A purchaser at a sale under the judgment in an attachment suit acquires the right of defendant in attachment, and has the same right to file a bill to annul a judgment in a senior attachment, on the ground that the affidavit showing defendant's address or that plaintiff after diligent inquiry was unable to ascertain it, required by Code of 1892 § 143, had not been made. *McKinney v. Adams*, 95 Miss. 832, 50 So. 474, 1909 Miss. LEXIS 304 (Miss. 1909).

A judgment rendered without proof of publication is void. *Oliver v. Baird*, 90 Miss. 718, 44 So. 35, 1907 Miss. LEXIS 104 (Miss. 1907).

Personal service of summons in another state, as authorized by § 3922 Code 1906, will not justify a personal judgment. *Cudabac v. Strong*, 67 Miss. 705, 7 So. 543, 1890 Miss. LEXIS 126 (Miss. 1890).

Where there is no return showing a service of process on defendant and no affidavit as required, although publication be made and be mailed, a judgment by default will be void. *Drysdale v. Biloxi Canning Factory*, 67 Miss. 534, 7 So. 541, 1890 Miss. LEXIS 124 (Miss. 1890).

Publication is to be made after the levy of the writ, if the defendant be not sum-

moned. Griffing v. Mills, 40 Miss. 611, 1866 Miss. LEXIS 102 (Miss. 1866).

RESEARCH REFERENCES

ALR.

Application of requirement that newspaper be locally published for official notice publication. 85 A.L.R.4th 581.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment § 491.

CJS.

7 C.J.S., Attachment § 468.

§ 11-33-39. When publication unnecessary.

Such publication of notice shall not be necessary if it shall be served on the nonresident defendant, and proof of such service be made as provided for in case of nonresident defendants in chancery; but such proof of service of notice shall be as effectual as if such defendant had been served with a summons.

HISTORY: Codes, 1880, § 2438; 1892, § 144; 1906, § 148; Hemingway's 1917, § 140; 1930, § 138; 1942, § 2694.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

§ 11-33-41. Form of notice required.

The notice of the attachment which the clerk is required to cause to be published may be in the following form, to wit:

“The State of Mississippi to _____ :

An attachment at the suit of _____ against your estate, for _____ dollars, returnable before the circuit court of _____ County, at _____ , Mississippi, has been executed, and is now pending in said court; and unless you appear before said court on the _____ Monday of _____ A. D. _____ , and plead to said action, judgment will be entered, and the estate attached will be sold.

_____ , A. D. _____ , Clerk.”

HISTORY: Codes, 1880, § 2439; 1892, § 145; 1906, § 149; Hemingway's 1917, § 141; 1930, § 139; 1942, § 2695.

Cross References — Applicability of provisions of this section to procedures for disposition of property seized in connection with violations of the Uniform Controlled Substances Law (§ 41-29-101 et seq.), see § 41-29-177.

Procedure for forfeiture of property seized for violation of fish and game laws, see

§ 49-7-251 et seq.

Service by publication in forfeiture proceeding under alcoholic beverage control law, see § 67-1-93.

Notice by publication, in proceeding for forfeiture of vehicle used in drive-by shooting, to contain requisites specified in this section, see § 97-3-111.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

§ 11-33-43. In absence of newspaper.

If there should be no newspaper published within the county in which the attachment is pending, or in a convenient county, such notice shall be posted at the door of the courthouse of the county, and that shall be instead of publication in a newspaper.

HISTORY: Codes, 1880, § 2440; 1892, § 146; 1906, § 150; Hemingway's 1917, § 142; 1930, § 140; 1942, § 2696.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR.

Application of requirement that newspaper be locally published for official notice publication. 85 A.L.R.4th 581.

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

§ 11-33-45. Property may be replevied.

The defendant, at any time before final judgment, may replevy the personal property seized and taken into possession by the officer serving an attachment, by giving to such officer a bond, with sufficient sureties, to be approved by him, payable to the plaintiff, in double the value of such property, conditioned to have said property forthcoming to answer and abide the judgment of the court in said suit, or, in default thereof, to pay and satisfy the judgment to the extent of the value of said property; and on the execution of such bond, the officer shall restore to the defendant the property so replevied, and shall return the bond so taken with the writ of attachment and all proceedings thereon. Such replevin shall not affect the lien of the attachment, or the proceedings thereon, as to any rights, credits, or choses in action of the defendant.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (10); 1857, ch. 52, art. 8; 1871, § 1439; 1880, § 2427; 1892, § 147; 1906, § 151; Hemingway's 1917, § 143; 1930, § 141; 1942, § 2697.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2697] applies to a purchase money lien proceeding under § 3080 Code 1906. *Flanagan v. King-Peoples Auto Co.*, 132 Miss. 95, 94 So. 841, 1923 Miss. LEXIS 3 (Miss. 1923).

Under this section [Code 1942, § 2697] the lien of an attachment is not affected by the execution of a bond conditioned to surrender the property to answer and abide the judgment of the court or to pay and satisfy the judgment to the extent of the value of such property. *C. D. Smith & Co. v. Lacey*, 86 Miss. 295, 38 So. 311, 1905 Miss. LEXIS 25 (Miss. 1905).

A discharge in bankruptcy of the party principally liable does not preclude a creditor, whose attachment had been levied upon the property of the bankrupt more than four months before bankruptcy proceedings, from entering such a qualified judgment against the bankrupt as will charge his sureties on a forthcoming bond. *C. D. Smith & Co. v. Lacey*, 86 Miss. 295, 38 So. 311, 1905 Miss. LEXIS 25 (Miss. 1905).

Although the defendant in a void attachment has replevied the property seized, his appearance alone for the purpose of moving to quash confers no jurisdiction to render judgment against him on the merits. *Wood v. Bailey*, 77 Miss. 815, 27 So. 1001, 1900 Miss. LEXIS 46 (Miss. 1900).

A defendant in attachment by executing

a forthcoming bond is estopped to deny the validity of the levy and cannot thereafter have the same quashed on the ground that the property, when seized by the sheriff, was in custodia legis under a previous levy by a constable. *Fenner v. Boutte*, 72 Miss. 271, 16 So. 259, 1894 Miss. LEXIS 76 (Miss. 1894).

If the constable levy on property and turn it over to the sheriff, the latter may take the discharge bond even if he be the plaintiff in the suit. *Forbes & Beck v. Navra*, 63 Miss. 1, 1885 Miss. LEXIS 1 (Miss. 1885).

The surety on the bond cannot plead to the action, or interpose any defense, or complain of any errors in the action against his principal; but he may contest his original liability on the bond or show a discharge from liability. *Atkinson v. Foxworth*, 53 Miss. 733, 1876 Miss. LEXIS 142 (Miss. 1876).

A surety on a replevin bond is only liable for the value of the property, and the jury must find the value. *Bedon v. Alexander*, 47 Miss. 254, 1872 Miss. LEXIS 70 (Miss. 1872); *Phillips v. Harvey*, 50 Miss. 489, 1874 Miss. LEXIS 81 (Miss. 1874).

The execution of a replevy-bond by the defendant before the return day of the writ is equivalent to personal service of process on him, and renders him personally amenable to the jurisdiction of the court. *Richard v. Mooney*, 39 Miss. 357, 1860 Miss. LEXIS 57 (Miss. 1860).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 463, 465.

CJS.

7 C.J.S., Attachment §§ 489, 510-513.

§ 11-33-47. Form of bond for replevin of goods.

The defendant's replevin bond may be in the following form, viz.:

"We, _____, principal, and _____ and _____ sureties, bind ourselves to pay _____ dollars, unless the said _____ shall have forthcoming to abide the judgment of the circuit court of _____ County, in the suit by attachment therein pending in which said _____ is plaintiff and said _____ is defendant, returnable on the _____ day of _____, _____ a certain _____ levied on by the sheriff of said county by virtue of said

attachment, and valued by him at _____, and now restored to said _____; or in default thereof shall satisfy such judgment to the extent of the value of said property, to replevy which this bond is given.

Witness our hands, this the _____ of _____ .

_____”

HISTORY: Codes, 1880, § 2477; 1892, § 148; 1906, § 152; Hemingway's 1917, § 144; 1930, § 142; 1942, § 2698.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-49. But one bond required.

If personal property be seized under an attachment writ, and the defendant, or a claimant, replevy the same, giving bond therefor, he shall not be deprived of the property under a subsequent attachment against the same defendant returnable to the same court to which the first writ is returnable; nor shall but one replevy bond be required. The bond given to the plaintiff in the first attachment shall inure to the benefit of the plaintiff in any subsequent attachment, and judgment may be rendered thereon as if it had been made payable to the plaintiff in the subsequent attachment. The officer shall show in his return on a subsequent attachment writ, what prior attachments in same court have been levied upon the property, if any, and whether the property has been replevied therein, naming the sureties on the bond.

HISTORY: Codes, 1892, § 149; 1906, § 153; Hemingway's 1917, § 145; 1930, § 143; 1942, § 2699.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-51. Execution against sureties.

Where the amount demanded in an untried prior attachment, or the judgment, if the same be tried, shall equal or exceed the value of the property replevied, an execution or other process shall not be issued against the sureties on the replevin bond on a judgment in a subsequent attachment, unless the prior attachment fails, or the judgment therein be satisfied otherwise than by the proceeds of the property replevied.

HISTORY: Codes, 1892, § 150; 1906, § 154; Hemingway's 1917, § 146; 1930, § 144; 1942, § 2700.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-53. Loss of priority.

If the plaintiff in a prior attachment fail to enforce his judgment, after ten days written notice to do so by the plaintiff in a subsequent attachment, he

shall lose his priority; but where the amount of the prior attachment shall be less than the value of the property, process may issue on the subsequent judgment against the sureties on the replevin bond for the difference between the amount of the prior attachment and the value of the property as shown in the officer's return.

HISTORY: Codes, 1892, § 151; 1906, § 155; Hemingway's 1917, § 147; 1930, § 145; 1942, § 2701.

Cross References — Forfeiture of priority of right to enforcement of judgment, see § 11-7-193.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 453, 454 et seq.

CJS.

7 C.J.S., Attachment §§ 374, 375, 418 et seq.

§ 11-33-55. One satisfaction releases sureties.

If the value of the property be paid by the sureties, or the property surrendered as provided in the bond, the judgment in the subsequent attachment shall, as to the sureties on the replevin bond, be satisfied.

HISTORY: Codes, 1892, § 152; 1906, § 156; Hemingway's 1917, § 148; 1930, § 146; 1942, § 2702.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 472, 511.

CJS.

7 C.J.S., Attachment §§ 171-173.

§ 11-33-57. Prior attachment from another court.

Execution or other process shall not issue against the sureties on the replevin bond where the property replevied hath been levied upon and replevied in a prior attachment against the same defendant, returnable to another court, unless the amount of the prior attachment and probable costs thereof be first deducted from the value of the property; and in such case execution may issue against the sureties only for the difference.

HISTORY: Codes, 1892, § 153; 1906, § 157; Hemingway's 1917, § 149; 1930, § 147; 1942, § 2703.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-59. Bond to discharge attachment for a debt due.

If any defendant in attachment for a debt due shall, at any time before the return thereof, execute and deliver to the officer serving the same, a bond, with two or more sufficient sureties, to be approved by said officer, payable to the plaintiff in attachment, in a penalty double the amount claimed by the plaintiff, conditioned to pay and satisfy any judgment which may be recovered by the plaintiff in the suit, with all costs, the attachment shall be thereby discharged; and all the property of every kind levied on, attached or seized by virtue thereof, shall be released and restored to such defendant. The bond shall be returned with the attachment; and in case of any recovery by the plaintiff in the suit, judgment shall be entered against the defendant and the sureties in the said bond. After the return of the attachment, the bond herein provided for may be given at any time before final judgment, and may be taken by the sheriff, or officer by whom the attachment was served, in case any of the attached property remains in his hands; otherwise, by the clerk of the court in which the attachment is pending.

HISTORY: Codes, 1857, ch. 52, art. 11; 1871, § 1440; 1880, § 2428; 1892, § 154; 1906, § 158; Hemingway's 1917, § 150; 1930, § 148; 1942, § 2704.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2704] applies to a purchase money lien proceeding

under § 3080 Code 1906. *Flanagan v. King-Peebles Auto Co.*, 132 Miss. 95, 94 So. 841, 1923 Miss. LEXIS 3 (Miss. 1923).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 472, 511.

§ 11-33-61. Form of bond to discharge attachment for debt due.

The bond to discharge the attachment for a debt due may be in the following form, viz.:

"We, _____ principal, and _____ and _____, as sureties, are held and bound to pay _____ the sum of _____ dollars, unless the said _____ shall satisfy any judgment which may be recovered against him by the said _____ in his attachment suit against the said _____ for _____ dollars, returnable before the circuit court of _____ County, on the _____ day of _____ A. D. _____."

HISTORY: Codes, 1880, § 2478; 1892, § 155; 1906, § 159; Hemingway's 1917, § 151; 1930, § 149; 1942, § 2705.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-63. Bond to discharge attachment for a debt not due.

If a defendant in attachment for a debt not due, shall on or before the return-day thereof, execute and deliver to the officer serving the same, a bond, with two or more sufficient sureties, to be approved by said officers, payable to the plaintiff in attachment, in a penalty double the amount claimed by the plaintiff, conditioned to pay the said debt when it shall become payable and costs of the attachment, the said attachment shall be discharged thereby, and all the property attached shall be released to the defendant. The bond shall be delivered by the officer to the plaintiff. After the return of the attachment, the bond herein provided for may be given at any time before final judgment, and may be taken by the sheriff or officer by whom the attachment was served, in case any of the attached property remains in his hands, or by the clerk of the court in which the attachment is pending.

HISTORY: Codes, 1892, § 156; 1906, § 160; Hemingway's 1917, § 152; 1930, § 150; 1942, § 2706.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-65. Form of bond to discharge attachment for debt not due.

The bond to discharge attachment for a debt not due may be in the following form, viz.:

“We, _____ principal, and _____ and _____, sureties, are held and bound to pay _____ the sum of _____ dollars, unless _____ shall well and truly pay _____ the sum demanded by him as plaintiff is his attachment suit for a debt not due, the sum of _____, dollars, on or before the _____ day of _____, A. D. _____, and pay the costs of said suit, which is pending in the circuit court of _____ County, Mississippi. This the _____ day of _____, A. D. _____.”

HISTORY: Codes, 1892, § 157; 1906, § 161; Hemingway's 1917, § 153; 1930, § 151; 1942, § 2707.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-67. Officer bound if bond insufficient.

If the bond or sureties given by the defendant, or any claimant of the property, or garnishee or other person, be insufficient, then the sheriff or other officer shall be subject to the same judgment with the surety in such bond as if he were cosurety thereon. And the court or judge, being satisfied that such bond is not a sufficient security, may order process to seize the property for

which the bond was given; and when seized it shall be dealt with as provided by law upon its seizure in the first instance under attachment.

HISTORY: Codes, 1880, § 2465; 1892, § 158; 1906, § 162; Hemingway's 1917, § 154; 1930, § 152; 1942, § 2708.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

This section is the exclusive remedy for insufficient bond or security. *Atkinson v.*

Foxworth, 53 Miss. 733, 1876 Miss. LEXIS 142 (Miss. 1876).

§ 11-33-69. Claim of third person to attached property.

All the provisions of law in relation to third persons claiming property levied on by virtue of fieri facias shall extend and apply to claimants of property levied on by virtue of writs of attachment. The trial of the right of property shall not be had until after judgment in favor of the plaintiff in the attachment suit, and proceedings in garnishment shall be in accordance with the provisions of law on that subject.

HISTORY: Codes, *Hutchinson's* 1848, ch. 56, art. 14 (5); 1857, ch. 52, art. 38; 1871, § 1456; 1880, § 2640; 1892, § 159; 1906, § 163; Hemingway's 1917, § 155; 1930, § 153; 1942, § 2709.

Cross References — Trial of right of property, see § 11-23-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Bond.
3. Costs.
4. Evidence.
5. Judgment.
6. Levy.
7. Parties.
8. Pleading.
9. Trial.

1. In general.

Where Mississippi resident did business ostensibly as a Tennessee corporation, and attachment was brought as against Tennessee corporation, resident must intervene and defend as the actual original party defendant, rather than as a third-party claimant, and circuit court properly dismissed her appeal from jus-

tice court decision, brought on theory that Tennessee corporation did not exist. *Taylor v. Aldridge*, 180 Miss. 635, 178 So. 331, 1938 Miss. LEXIS 29 (Miss. 1938).

The facts set out in an affidavit propounding a claim to proceeds of goods, held to present a good claim. *Kohlman v. First Nat'l Bank*, 71 Miss. 843, 15 So. 131, 1894 Miss. LEXIS 37 (Miss. 1894).

2. Bond.

Claimant of property in proceeding against nonresident and surety on forthcoming bond held not estopped to claim advantage because bond appears to be in replevin. *Mercantile Acceptance Corp. v. Hedgepeth*, 147 Miss. 717, 112 So. 872, 1927 Miss. LEXIS 319 (Miss. 1927).

Personal property seized on attachment and delivered to a claimant under a forthcoming bond is no longer in custodia legis

and is subject to execution or attachment by creditors of the claimant. *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769, 1895 Miss. LEXIS 30 (Miss. 1895).

Where property embraced in a trust deed has been attached at the suit of creditors of a grantor, a claimant's bond, executed by the trustee, stands in lieu of the property, and a subsequent irregular disposition of the same by the claimant will not render the trust deed fraudulent as to such attaching creditors. *Hooker v. Sutcliff*, 71 Miss. 792, 15 So. 140, 1894 Miss. LEXIS 45 (Miss. 1894).

If a claimant give bond, and be given the property thereon, and his claim is dismissed for want of the proper affidavit, suit may be maintained on the bond. *Higdon v. Vaughn*, 58 Miss. 572, 1880 Miss. LEXIS 160 (Miss. 1880).

3. Costs.

It is within the discretion of the court when a claimant's issue is made in attachment proceedings to require the claimant to file security for costs made by it. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866, 1916 Miss. LEXIS 6 (Miss. 1916).

Attorney's fees and other expenses incurred in sustaining a claimant's issue for property seized under attachment are not ordinarily recoverable in a suit on an indemnifying bond. *Moore v. Lowrey*, 74 Miss. 413, 21 So. 237, 1896 Miss. LEXIS 161 (Miss. 1896).

4. Evidence.

Plaintiff cannot show on claimant's issue that title to property attached as owned by defendant was in fact owned by plaintiff. *Forest Lumber Co. v. Lightsey*, 136 Miss. 625, 101 So. 689, 1924 Miss. LEXIS 167 (Miss. 1924).

Plaintiff in attachment has the burden of proof on the trial of the claimant's issue. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866, 1916 Miss. LEXIS 6 (Miss. 1916).

On the trial of a claimant's issue, it is error to instruct that the judgment sustaining the attachment is prima facie evidence against the claimant, and places upon him the burden of showing that he is

a bona fide purchaser of the goods attached. As against the claimant, such judgment is not evidence of the facts on which it rests. *Ott v. Smith*, 68 Miss. 773, 10 So. 70 (Miss. 1891).

In the trial of such issue, judgment in plaintiff's favor against the defendant in attachment is a part of the record, and need not be offered in evidence. *French v. Sale*, 60 Miss. 516, 1882 Miss. LEXIS 92 (Miss. 1882).

5. Judgment.

If an attachment issue be found for plaintiff, it is not improper to enter judgment in the usual form, condemning the attached property to the payment of the debt found to be due to plaintiff, although a claimant's issue is pending; but in such case the judgment will not be executed until the claimant's issue is disposed of. *Montgomery v. Goodbar*, 69 Miss. 333, 13 So. 624, 1891 Miss. LEXIS 136 (Miss. 1891).

6. Levy.

Knowledge by a plaintiff and his attorney that a bill of sale of personal property has been executed by the defendant in execution and duly recorded, does not make a levy thereon a wilful wrong. *Moore v. Lowrey*, 74 Miss. 413, 21 So. 237, 1896 Miss. LEXIS 161 (Miss. 1896).

7. Parties.

Claimants of property levied on and surety became parties to cause and submitted themselves to authority of court. *Mercantile Acceptance Corp. v. Hedgepeth*, 147 Miss. 717, 112 So. 872, 1927 Miss. LEXIS 319 (Miss. 1927).

8. Pleading.

Plaintiff's failure to make issue at return term to try claimant's right to funds in garnishee's hands held not to constitute "default." *Piqua Sav. Bank v. Copiah Hardware Co.*, 146 Miss. 581, 111 So. 836, 1927 Miss. LEXIS 225 (Miss. 1927).

The claimant or intervener in attachment is not required to join issue until final judgment in the attachment. *Mahaffey Co. v. Russell & Butler*, 100 Miss. 122, 54 So. 807, 1911 Miss. LEXIS 92 (Miss. 1911).

Plaintiff in attachment by joining issue on a claim to the property when filed, waives right to have the claim dismissed as improperly filed. *Minshew v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315, 1905 Miss. LEXIS 29 (Miss. 1905).

A claimant cannot on mere motion secure the delivery to him of property attached within four months of the debtor's adjudication in bankruptcy. There is privity of estate between the debtor and his trustees and the cause must be disposed of on appropriate pleadings. *New Orleans Acid & Fertilizer Co. v. Grissom*, 79 Miss. 662, 31 So. 336, 1901 Miss. LEXIS 110 (Miss. 1901).

As many claims may be interposed to property seized by attachment and as many issues made up to try the same as may be necessary; and this whether the property remains in court or has been delivered to a claimant on bond. *Dreyfus v.*

Mayer, 69 Miss. 282, 12 So. 267, 1891 Miss. LEXIS 107 (Miss. 1891).

9. Trial.

The word "trial" in the last clause of this section [Code 1942, § 2709] is used in its comprehensive sense and means, not alone that the claimant's issue shall not be tried until final judgment in the main case, but that such issue is not to be made up until then, the making up of the issue being a part of the "trial" in the broad meaning of the word. *White v. Roach*, 98 Miss. 309, 53 So. 622, 1910 Miss. LEXIS 63 (Miss. 1910).

When there has been no service of process of any kind of an ancillary writ of attachment, the trial of the claimant's issue after judgment by default for the debt is premature. *Lamb v. Russel*, 81 Miss. 382, 32 So. 916, 1902 Miss. LEXIS 122 (Miss. 1902).

RESEARCH REFERENCES

ALR.

Right of successful claimant of property to attorneys' fees for wrongful attachment. 65 A.L.R.2d 1426.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 506 et seq.

Claims of third persons, 2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 491 et seq.

CJS.

7 C.J.S., Attachment §§ 576-578 et seq.

§ 11-33-71. Property in danger of waste to be sold pending suit.

When goods and chattels levied upon under an attachment are in danger of immediate waste and decay, or when live stock, or a stock of goods of any kind, is so levied upon, and the same is not replevied by the defendant or claimant, the officer holding them may sell them as like property is required to be sold under execution. The proceeds of such sale shall be held by the officer to abide the result of the suit, unless replevied. The owner of such goods may replevy the same, as in other cases, at any time before sale, and after sale, the money. If the term of court to which the writ of attachment is returnable commences within fifteen days of the levy, none of the property, except such as may be in danger of immediate waste and decay, shall be sold until after the court is held; and if the cause be continued, the property may then be sold.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (22); 1857, ch. 52, art. 17; 1871, §§ 1466 et seq; 1880, § 2462; 1892, § 160; 1906, § 164; Hemingway's 1917, § 156; 1930, § 154; 1942, § 2710.

Cross References — Money paid into the justice court clerk clearing account, see

§ 9-11-18.

Disposal of property which is not bonded, see § 11-29-13.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Railroad crossties, though liable to be burned, are not in danger of “immediate

waste and decay.” Goodman v. Moss, 64 Miss. 303, 1 So. 241, 1886 Miss. LEXIS 61 (Miss. 1886).

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 471 et seq.

§ 11-33-73. How certain other property may be sold pending suit.

When personal property levied upon under an attachment shall not be subject to sale under the provisions of Section 11-33-71, and the same shall not be replevied by the defendant or claimant within ten days after the levy, the judge or the justice of the peace in whose court the suit may be pending, on the application of any party to the suit, and upon ten days’ notice to all other parties to the suit of the time and place of the hearing, may make an order directing the officer having custody of said property to sell the same, as provided by law for such sales, under execution, and the proceeds of said sale shall be held by such officer to abide the result of the suit unless replevied by the defendant or claimant.

HISTORY: Codes, 1906, § 165; Hemingway’s 1917, § 157; 1930, § 155; 1942, § 2711.

Editor’s Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Remedial orders, see § 11-7-169.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 471 et seq.

§ 11-33-75. Death of defendant does not abate action.

If the defendant dies after service of the writ of attachment, the action shall not thereby be abated, but may be prosecuted to judgment, sale, transfer, and final determination as if the defendant’s death had not occurred; and all proceedings and conveyances in such case shall be as valid and effectual in law as if had and made in the lifetime of defendant.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (28); 1857, ch. 52, art. 39; 1871, § 1486; 1880, § 2466; 1892, § 161; 1906, § 166; Hemingway's 1917, § 158; 1930, § 156; 1942, § 2712.

Cross References — Effect of death of party to action, generally, see § 11-7-29.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If the administrator appear, or be brought into court, a judgment in personam may be rendered against him as such. *Lowenberg v. Tironi*, 62 Miss. 19, 1884 Miss. LEXIS 7 (Miss. 1884).

The administrator of the deceased defendant may appear, whether the deceased was or was not served. *Dyson v. Baker*, 54 Miss. 24, 1876 Miss. LEXIS 5 (Miss. 1876).

The object of the section [Code 1942, § 2712] is to authorize the court, after the attachment was served, notwithstanding the death of defendant, to proceed to judgment and sale, or final process, against the garnishee and property attached. For those purposes, and to that extent, the process is strictly in rem. *Holman v. Fisher*, 49 Miss. 472, 1873 Miss. LEXIS 135 (Miss. 1873).

RESEARCH REFERENCES

ALR.

Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by attachment, garnishment, or like process. 40 A.L.R.2d 1111.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment § 369.

§ 11-33-77. The declaration and subsequent pleadings.

The declaration may be filed on or before the return day of the attachment or before an order of dismissal be taken; and the defendant shall plead thereto as in other cases.

HISTORY: Codes, 1880, § 2441; 1892, § 162; 1906, § 167; Hemingway's 1917, § 159; 1930, § 157; 1942, § 2713.

Cross References — Declaration or bill, see § 11-1-45.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Section 1475.5, Code of 1942, has supplanted this section [§ 2713] and § 2716, Code of 1942, as well as other sections of the Code dealing with pleas in abatement, and has also supplanted the common-law rules dealing with such pleas. *Home Ins.*

Co. v. Watts, 229 Miss. 735, 91 So. 2d 722, 1957 Miss. LEXIS 321 (Miss. 1957).

This section [Code 1942, § 2713], providing that when there is a plea in abatement there shall be no plea to the merits until the issue of abatement has been disposed of, and Code 1942, § 2716, pro-

viding for the empanelling of a jury to try the issue of abatement, are supplanted by Laws 1948, ch. 230 [Code 1942, § 1475.5] abolishing pleas in the circuit court and providing for all defenses, whether consistent or not, to be set out in an answer, to the extent that separate hearings on distinct, separable defenses are left to the judicial discretion of the trial court. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579, 1951 Miss. LEXIS 359 (Miss. 1951).

Where the trial court tries attachment and debt issues together and both sides acquiesced by not making any objection, any error in this joinder was waived. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579, 1951 Miss. LEXIS 359 (Miss. 1951).

Where the declaration for the debt was defective in failing to allege the amount due, neither a motion to strike it from the files on the theory that it was legally insufficient in substance nor motion to quash the attachment on the same grounds was the proper method for presenting the question. *Kehlor Flour Mills Co. v. Reeves Grocery Co.*, 113 Miss. 30, 73 So. 866, 1916 Miss. LEXIS 5 (Miss. 1916).

The attachment may be against one debtor and the declaration in the cause be against several, provided the debt owing by the debtors not attached be due when the declaration is filed against them. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229, 1889 Miss. LEXIS 113 (Miss. 1889).

§ 11-33-79. Judgment by default.

If the defendant shall not appear and plead to the action, in pursuance of notice, the court, as in other cases, shall give judgment against him by default, and award a writ of inquiry if necessary; but on such judgment by default, unless granted on the service of summons executed in this state, no execution shall issue except against the property on which the attachment has been served, or against a garnishee who shall have money or property in his hands belonging to the defendant.

HISTORY: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (25); 1857, ch. 52, art. 21; 1871, § 1477; 1880, § 2467; 1892, § 163; 1906, § 168; *Hemingway's* 1917, § 160; 1930, § 158; 1942, § 2714.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Plaintiff's failure to make issue at return term to try claimant's right to funds in garnishee's hands held not to constitute "default." *Piqua Sav. Bank v. Copiah Hardware Co.*, 146 Miss. 581, 111 So. 836, 1927 Miss. LEXIS 225 (Miss. 1927).

Sale without giving bond on default decree, in attachment against nonresident on publication, is void. *Seay v. Wofford*, 141 Miss. 888, 106 So. 751, 1926 Miss. LEXIS 443 (Miss. 1926).

Where there has been no service of process of any kind of an ancillary writ of attachment, the trial of a claimant's issue after judgment by default for the debt is premature. *Lamb v. Russel*, 81 Miss. 382,

32 So. 916, 1902 Miss. LEXIS 122 (Miss. 1902).

A judgment for the debt in attachment should be set aside for want of jurisdiction when there has been no levy upon property or garnishment in the county where the action was brought, although an alias writ of attachment has been served upon the defendant as a summons in another county where he resides. *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844, 1896 Miss. LEXIS 112 (Miss. 1896).

Although judgment for plaintiff is entered on the attachment for want of a plea in abatement, yet if the debt issue is decided for defendant, this is conclusive evidence that the attachment was wrong-

fully sued out and defendant has a right of action for damages on the attachment-bond. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (Miss. 1893).

Where judgment by default on the attachment issue is rendered for plaintiff, but the issue made by the plea denying the debt is found for defendant, thus dissolving the attachment, the defendant is not entitled to a writ of inquiry to assess his damages for the wrongful suing out of the attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111, 1892 Miss. LEXIS 6 (Miss. 1892).

Such writ of inquiry is allowed only where the issue on a plea in abatement is found for defendant, or where plaintiff voluntarily dismisses his attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111, 1892 Miss. LEXIS 6 (Miss. 1892).

Nor can a personal judgment be sustained by service of process in another state. *Cudabac v. Strong*, 67 Miss. 705, 7 So. 543, 1890 Miss. LEXIS 126 (Miss. 1890).

The attachment may be against one debtor and the declaration in the cause be against several, provided the debt owing by the debtors not attached be due when the declaration is filed against them. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229, 1889 Miss. LEXIS 113 (Miss. 1889).

Although a judgment by default against a nonresident be personal in form, it cannot, if he were notified by publication only, affect any of his property except that attached and condemned. *Tabler, Crudup & Co. v. Mitchell*, 62 Miss. 437, 1884 Miss. LEXIS 100 (Miss. 1884).

A judgment against a defendant in an attachment case is, in legal effect, a judgment of condemnation ordering the sale of the property attached, and no formal order for sale in the judgment is necessary. *Sale v. French*, 61 Miss. 170, 1883 Miss. LEXIS 98 (Miss. 1883).

RESEARCH REFERENCES

ALR.

What amounts to "appearance" under statute or rule requiring notice, to party

who has "appeared," of intention to take default judgment. 73 A.L.R.3d 1250.

§ 11-33-81. Defendant may defend without replevying property.

The defendant in attachment may appear, without replevying the property attached, and defend the suit as in other actions for the recovery of money. In case the defendant shall have been personally summoned, or shall appear and plead to the action, the judgment therein shall have the same force and effect against the person and property of the defendant as in other actions where a summons has been personally served on him. Such appearance shall not vacate or affect any bond taken hereunder, nor discharge any garnishee, nor affect any lien created by the attachment; but the proceedings in respect to any property attached, or any garnishee summoned, shall be the same as if final judgment had been entered by default.

HISTORY: Codes, 1857, ch. 52, art. 20; 1871, § 1476; 1880, § 2436; 1892, § 164; 1906, § 169; Hemingway's 1917, § 161; 1930, § 159; 1942, § 2715.

Cross References — Attachment against nonresidents, see § 11-31-9. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Defendant in attachment suit may file counterclaim for actual damages and attorney's fee. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Notwithstanding defendant in attachment has enjoined various creditors from proceeding with their suits in so far as to

disturb his possession of certain property claimed to be in custodia legis in other proceedings, they may proceed to obtain personal judgments, and if the defendant fails to defend on the merits, he is bound by such judgments. *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769, 1895 Miss. LEXIS 30 (Miss. 1895).

§ 11-33-83. Answer traversing truth of alleged attachment grounds; trial of issue.

The defendant in attachment may, as a defense in his answer, traverse the truth of the alleged grounds upon which the attachment was sued out. Upon such defense being filed, the court, in its discretion, upon motion of either or any party, may order a jury to be empaneled to try the issue, or it may submit such issue to the jury empaneled to try the case on its merits. If the jury shall find for the defendant, it shall assess damages against the plaintiff for wrongfully suing out the same.

HISTORY: Codes, 1857, ch. 52, art. 14; 1871, § 1459; 1880, § 2429; 1892, § 165; 1906, § 170; Hemingway's 1917, § 162; 1930, § 160; 1942, § 2716.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Evidence.
3. Setoff or counterclaim.
4. Assessment of damages.

1. In general.

Section 1475.5, Code 1942, has supplanted this section [§ 2716] and § 2713, Code of 1942, as well as other sections of the Code dealing with pleas in abatement, and has also supplanted the common-law rules dealing with such pleas. *Home Ins. Co. v. Watts*, 229 Miss. 735, 91 So. 2d 722, 1957 Miss. LEXIS 321 (Miss. 1957).

The provisions of this section [Code 1942, § 2716], providing for the empanelling of a jury to try the issue raised by a plea in abatement, and Code 1942, § 2713, providing that no plea to the action shall be made until the issue raised

by a plea in abatement of the attachment shall be disposed of, are supplanted by Laws 1948, ch. 230 [Code 1942, § 1475.5], which abolishes pleas in the circuit court and provides for every defense, whether consistent or not, to be set out in an answer, to the extent that the granting of separate hearings on particular, distinct and separable offenses is left to the judicial discretion of the trial court. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579, 1951 Miss. LEXIS 359 (Miss. 1951).

Where the trial court tries attachment and debt issues together and both sides acquiesced by not making any objection, any error in this joinder was waived. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579, 1951 Miss. LEXIS 359 (Miss. 1951).

In an action on an account begun by attachment, the question whether the debt was due cannot be raised where not

set up by a plea in abatement. *Lee v. McConnell*, 109 Miss. 839, 69 So. 706, 1915 Miss. LEXIS 232 (Miss. 1915).

A denial of the ground of attachment in a plea in abatement is not a denial of indebtedness so as to make them an issue on the trial of the right to attach. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166, 1915 Miss. LEXIS 141 (Miss. 1915).

Since to authorize an attachment against a debtor on the ground of nonresidence the debt must be due, a plea in abatement that it was not due when suit was begun is sufficient. *Stadder v. Jacobs*, 70 Miss. 429, 12 So. 444 (Miss. 1892).

Unless the question is one of the defendant's estoppel to deny the ground of attachment, plaintiff's belief as to defendant's solvency or the truth of the grounds of attachment is immaterial. *Stadder v. Jacobs*, 70 Miss. 429, 12 So. 444 (Miss. 1892).

If an attachment issue be found for plaintiff, it is not improper to enter judgment in the usual form condemning the attached property to the payment of the debt found to be due to plaintiff, although a claimant's issue is pending; but in such case the judgment will not be executed until the claimant's issue is disposed of. *Montgomery v. Goodbar*, 69 Miss. 333, 13 So. 624, 1891 Miss. LEXIS 136 (Miss. 1891).

Special allegations in the plea, if the plea deny the grounds, do not vitiate it; but the traverse should be a simple denial. *Ross v. Fowler*, 42 Miss. 293, 1868 Miss. LEXIS 64 (Miss. 1868).

The issue is whether or not the attachment was rightfully sued out, and not whether the matters of fact stated in the affidavit are true or false. The doctrine of estoppel applies. *Cocke v. Kuykendall*, 41 Miss. 65, 1866 Miss. LEXIS 8 (Miss. 1866).

2. Evidence.

Evidence held to warrant peremptory instruction that attachment was wrongfully sued out. *Turner v. Crane*, 115 Miss. 134, 75 So. 945, 1917 Miss. LEXIS 192 (Miss. 1917).

On plea of abatement to attachment on the ground of concealment and fraudulent disposition and conversion of property, testimony of ability to pay does not entitle the defendant to a peremptory instruction. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166, 1915 Miss. LEXIS 141 (Miss. 1915).

On the trial of the attachment issue, the plaintiff's affidavit having alleged fraudulent conduct of the debtor, evidence of the latter's rating or want of rating by commercial agencies, unconnected with any conduct of the debtor on which it was based, was properly excluded as irrelevant. *Lowenstein v. Aaron*, 69 Miss. 341, 12 So. 269, 1891 Miss. LEXIS 108 (Miss. 1891).

3. Setoff or counterclaim.

Defendant in attachment suit may file counterclaim for actual damages and attorney's fee. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Appeal is authorized from judgment in attachment and garnishment of less than \$50.00 where counterclaim for damages after deducting judgment exceeded \$50.00. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Where defendant recovers a judgment for damages, and plaintiff's action thereby abates, and the assignee of such judgment seeks to enforce it, plaintiff, though his claim has meantime become barred, the defendant being insolvent, may resort to equity to enforce his right conferred by Code 1880, § 2687, to use said claim defensively as an offset against the judgment. *Feld v. Coleman*, 72 Miss. 545, 17 So. 378, 1895 Miss. LEXIS 15 (Miss. 1895).

4. Assessment of damages.

Defendant is only entitled to a writ of inquiry where the issue on a plea in abatement is found for him, or where the plaintiff dismisses his attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111, 1892 Miss. LEXIS 6 (Miss. 1892).

RESEARCH REFERENCES

ALR.

Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by attachment, garnishment, or like process. 40 A.L.R.2d 1111.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 374, 537, 541, 542, 549, 551.

CJS.

7 C.J.S., Attachment §§ 505-513.

§ 11-33-85. Answer traversing truth of alleged attachment grounds; damages in favor of defendant.

On the trial of the issue of the truth of the alleged attachment grounds, the defendant may introduce evidence as to the actual damages, if any, which the issuance of the attachment has occasioned him; but the defendant, when he files his answer setting up the defense traversing the truth of the alleged attachment grounds, shall file therewith written notice of what damages he will insist upon at the trial. If the issue be decided for the defendant, he shall have judgment that the attachment be discharged and against plaintiff and the sureties in his attachment bond, for the damages assessed by the jury and the costs of suit; and the jury may add to the actual damages found a reasonable sum as an attorney's fee for defending the issue; but the judgment against the sureties in the attachment bond shall not exceed the penalty thereof.

HISTORY: Codes, 1857, ch. 52, art. 14; 1871, § 1462; 1880, § 2430; 1892, § 166; 1906, § 171; Hemingway's 1917, § 163; 1930, § 161; 1942, § 2717.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Measure and elements of damages.

1. In general.

This section clearly provides that the testing of the grounds of attachment shall be in the court initiating the suit and that actual damages shall be proved in that court. Failure of garnishee to follow proper procedure entitled the creditor to a peremptory instruction in the garnishee's action for wrongful garnishment. *Tower Loan Brokers, Inc. v. Davis*, 320 So. 2d 770, 1975 Miss. LEXIS 1497 (Miss. 1975).

Appeal is authorized from judgment in attachment and garnishment of less than \$50 where counterclaim for damages after

deducting judgment exceeded \$50. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

A defendant in wrongful attachment is entitled to have his damages assessed on writ of inquiry if the question of indebtedness be decided in his favor, though the grounds of attachment were not contested. *R. J. McLin & Co. v. Worden*, 99 Miss. 547, 55 So. 358, 1911 Miss. LEXIS 229 (Miss. 1911).

Where an attachment, though based on nonresidence of defendant, was improperly sued out because there was no debt, under Code 1892, § 166, defendant may have judgment on the bond in the attachment suit without resort to an independent action. *C. M. Carrier & Son v. Poulas*,

87 Miss. 595, 40 So. 164, 1905 Miss. LEXIS 187 (Miss. 1905).

Defendant is not entitled to a writ of inquiry to assess his damages for the wrongful suing out of the attachment except where the issue on a plea in abatement is found for him, or where plaintiff voluntarily dismisses his attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111, 1892 Miss. LEXIS 6 (Miss. 1892).

The jury has as large a scope to consider the damages on a plea traversing the grounds of attachment as in a suit on the attachment bond. *Fleming & Baldwin v. Bailey*, 44 Miss. 132, 1870 Miss. LEXIS 93 (Miss. 1870); *Marqueze v. Sontheimer*, 59 Miss. 430, 1882 Miss. LEXIS 130 (Miss. 1882).

2. Measure and elements of damages.

Jury may not assess nominal damages where proof discloses actual damages. *Levy v. J. A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296, 1959 Miss. LEXIS 489 (Miss. 1959).

It is defendant's duty to reduce damages by giving bond and retaining possession of attached property. *Levy v. J. A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296, 1959 Miss. LEXIS 489 (Miss. 1959).

Person incurring attorney's fees in bringing suit for damages for attachment for rent is entitled to recover therefor. *Wigginton v. Moore*, 147 Miss. 169, 113 So. 326, 1927 Miss. LEXIS 346 (Miss. 1927).

Defendant in attachment suit may file counterclaim for actual damages and attorney's fee. *Crooke v. Deas & Duke*, 146

Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Damages of a remote and speculative character cannot be received for the wrongful suing out of attachment. *Turner v. Crane*, 115 Miss. 134, 75 So. 945, 1917 Miss. LEXIS 192 (Miss. 1917).

Loss of business, as to goods attached, caused by the attachment, may be a factor in estimating damages, if proved as a matter of fact and not as a mere opinion or estimate of witnesses. *Marqueze v. Sontheimer*, 59 Miss. 430, 1882 Miss. LEXIS 130 (Miss. 1882).

Damages resulting from a levy by judgment creditors, subsequent to the levy of an attachment, made in consequence of the attachment, cannot be recovered of the attaching plaintiff. *Marqueze v. Sontheimer*, 59 Miss. 430, 1882 Miss. LEXIS 130 (Miss. 1882).

Compensation is the measure of damages. *Marqueze v. Sontheimer*, 59 Miss. 430, 1882 Miss. LEXIS 130 (Miss. 1882).

Where there is no malice or intent to oppress, the damages should be limited to those actually sustained; mere possible expectations of profits are not to be considered. *Myers v. Farrell*, 47 Miss. 281, 1872 Miss. LEXIS 75 (Miss. 1872).

The extent of the depreciation in value between the time property was attached, and the time the attachment is quashed or the property is restored, is the measure of the actual damages for preventing a sale of the property. *Fleming & Baldwin v. Bailey*, 44 Miss. 132, 1870 Miss. LEXIS 93 (Miss. 1870).

RESEARCH REFERENCES

ALR.

Right to attorneys' fees for wrongful attachment. 65 A.L.R.2d 1426.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment. 61 A.L.R.3d 984.

Attorneys' fees: cost of services provided

by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am. Jur.

2 Am. Jur. Proof of Facts, Attachment, Proof No. 1 (Wrongful attachment).

§ 11-33-87. Answer traversing truth of alleged attachment grounds—effect of decision in plaintiff's favor.

If the issue on the defense traversing the truth of the alleged attachment

grounds be decided for plaintiff, the defendant shall be permitted to go on to trial of the merits upon his answer as a whole.

HISTORY: Codes, 1857, ch. 52, art. 14; 1871, § 1464; 1880, § 2431; 1892, § 169; 1906, § 174; Hemingway's 1917, § 166; 1930, § 163; 1942, § 2719.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The defendant cannot plead to the merits without waiving his plea in abatement.

Lewenthall v. Mississippi Mills, 55 Miss. 101, 1877 Miss. LEXIS 112 (Miss. 1877).

§ 11-33-89. Property assessment and judgment in certain cases.

If the personal property attached, or any part thereof, shall have been replevied by the defendant, the court or jury trying the issue between the parties, if it find for the plaintiff, shall assess the value of the property so replevied by the defendant, as well as the debt or damages due the plaintiff. If the value of the property shall equal the amount found due the plaintiff, judgment shall be entered against the defendant and his sureties in such replevin bond, for the amount of said value. If the value of the property be less than the amount found due the plaintiff, judgment shall be entered against the defendant for the amount of the verdict, and against the sureties in his replevin bond for the value of the property so replevied. If judgment by default shall be entered in such case against the defendant, an inquiry shall be awarded to assess the value of the property so replevied; and on the execution thereof judgment shall be rendered as above provided. In all cases, the judgment against the sureties of the defendant shall be satisfied and discharged by the delivery to the sheriff of the property replevied within ten days after execution on such judgment shall have come to his hands; and the sheriff shall sell the property so delivered to him, and apply the proceeds to the payment of the execution.

HISTORY: Codes, 1857, ch. 52, art. 9; 1871, § 1448; 1880, § 2455; 1892, § 167; 1906, § 172; Hemingway's 1917, § 164; 1930, § 162; 1942, § 2718.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Rendering decree on forthcoming bond for penalty without finding value of automobile claimed thereunder held erroneous. Mercantile Acceptance Corp. v. Hedgepeth, 147 Miss. 717, 112 So. 872, 1927 Miss. LEXIS 319 (Miss. 1927).

Where the attachment is levied on vari-

ous articles which are replevied, the value of each article separately should be assessed. Thomason v. Wadlington, 53 Miss. 560, 1876 Miss. LEXIS 115 (Miss. 1876); Atkinson v. Foxworth, 53 Miss. 733, 1876 Miss. LEXIS 142 (Miss. 1876).

The sureties, when it is proposed to enter judgment against them, may show

any reason, good in law, why the bond should not be declared forfeited; they may show that it is impossible to return animals bonded, because they had died without the fault or negligence of their principal. *Atkinson v. Foxworth*, 53 Miss. 741, 1876 Miss. LEXIS 143 (Miss. 1876).

Plaintiff cannot take judgment in the attachment against the defendant only, the principal in the bond, and afterwards bring a separate action against the sureties. *McKinney v. Green*, 52 Miss. 70, 1876 Miss. LEXIS 165 (Miss. 1876).

If the value of the property be not assessed, it is error to render judgment for the whole of plaintiff's demand against the sureties. *Phillips v. Harvey*, 50 Miss. 489, 1874 Miss. LEXIS 81 (Miss. 1874).

A failure to comply with the statute vitiates the verdict. *Young v. Pickens & Green*, 45 Miss. 553, 1871 Miss. LEXIS 101 (Miss. 1871); *Bedon v. Alexander*, 47 Miss. 254, 1872 Miss. LEXIS 70 (Miss. 1872).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 494 et seq.

CJS.

7 C.J.S., Attachment §§ 543, 544-548.

§ 11-33-91. Voluntary dismissal and damages.

The plaintiff may dismiss his attachment, but defendant shall have a jury impanelled forthwith to assess the damages sustained by reason of suing out the attachment.

HISTORY: Codes, 1871, § 1465; 1880, § 2432; 1892, § 168; 1906, § 173; *Hemingway's* 1917, § 165; 1930, § 164; 1942, § 2720.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

When the issue in abatement is found against several defendants, and the plaintiff, failing to establish his debt as to one, dismisses as to him, the judgment on plea in abatement is thereby vacated as to this defendant, and he is entitled to have his damages assessed. *Dean v. Stephenson*,

61 Miss. 175, 1883 Miss. LEXIS 99 (Miss. 1883).

If such defendant fail to ask for damages or make claim for the property or its proceeds, he can neither obtain a new trial nor appeal. *Dean v. Stephenson*, 61 Miss. 175, 1883 Miss. LEXIS 99 (Miss. 1883).

RESEARCH REFERENCES

ALR.

Effect of nonsuit, dismissal, or discon-

tinuance of action on previous orders. 11 A.L.R.2d 1407.

§ 11-33-93. Judgment in case debt not due.

In determining the amount for which judgment shall be rendered on the merits in favor of plaintiff whose debt is not due, interest shall not be computed on the principal for a time beyond the rendition of the judgment; and if the debt do not bear interest until a future day, the principal shall be discounted for the

time to elapse before interest begins, at the rate at which the debt will bear interest. Such judgments shall be enforced as in other cases.

HISTORY: Codes, 1892, § 170; 1906, § 175; Hemingway's 1917, § 167; 1930, § 165; 1942, § 2721.

Cross References — Attachment for debt not due, see § 11-33-35.
Bond to discharge attachment for a debt not due, see § 11-33-63.
Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-95. Judgment for damages pleadable as payment.

The judgment in favor of the defendant against the plaintiff for the damages assessed and the costs may be pleaded by the defendant as a payment in the same action, or in any other suit on the same cause of action on which the attachment was sued out. An execution shall not be issued on such judgment until after the dismissal of the action or final judgment on the merits. If the action be dismissed, or if, upon a trial on the merits, judgment be in favor of the defendant, without his having obtained the benefit of the judgment in his favor for damages and costs, he shall have execution of said judgment in his favor. If the plaintiff recover in the trial on the merits, and on such trial the defendant did not avail of his judgment against the plaintiff for damages and costs, the greater recovery shall be credited with the sum of the smaller, and judgment shall be rendered by the court in favor of the party to whom the difference may be due.

HISTORY: Codes, 1880, § 2433; 1892, § 171; 1906, § 176; Hemingway's 1917, § 168; 1930, § 166; 1942, § 2722.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where defendant recovers a judgment for damages, and plaintiff's action thereby abates and the assignee of such judgment seeks to enforce it, plaintiff though his claim has meantime become barred, the defendant being insolvent, may resort to

equity to enforce his right conferred by § 2756 Code 1880, to use said claim defensively as an offset against the judgment. *Feld v. Coleman*, 72 Miss. 545, 17 So. 378, 1895 Miss. LEXIS 15 (Miss. 1895).

§ 11-33-97. Discharge of attachment not to affect action.

If the issue on the defense traversing the truth of the alleged attachment grounds be found for the defendant, the attachment shall be thereby discharged, and all property seized under it, and all persons summoned as garnishees, shall be released from it; but the action, unless dismissed by the plaintiff, shall be proceeded with in all respects as if it had been an ordinary action in its commencement; and the costs accruing in it, after the trial of the issue on the said defense, shall abide the result of such action.

HISTORY: Codes, 1880, § 2434; 1892, § 172; 1906, § 177; Hemingway's 1917, § 169; 1930, § 167; 1942, § 2723.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

An action commenced by attachment shall not be dismissed over the objection of the plaintiff when the issue on a plea in abatement is found for the defendant, but should be proceeded with as if it had been an ordinary action in the commencement. *McCormick v. Hawks*, 131 Miss. 111, 95 So. 241, 1922 Miss. LEXIS 275 (Miss. 1922).

This section [Code 1942, § 2723] does not apply if the attachment be so utterly void as not to be amendable, and there was no trial on a plea in abatement, no summons and no appearance of the defendant save to object to the void attachment. *Wood v. Bailey*, 77 Miss. 815, 27 So. 1001, 1900 Miss. LEXIS 46 (Miss. 1900).

§ 11-33-99. Attachment preserved by appeal.

If the plaintiff, within ten days after the expiration of the term of the court at which judgment is rendered discharging his attachment, shall perfect an appeal from such judgment, the attachment shall not be discharged, nor garnishees nor property released therefrom, by such judgment; but such appeal shall preserve the attachment in full force, to await the result of the appeal.

HISTORY: Codes, 1880, § 2435; 1892, § 173; 1906, § 178; Hemingway's 1917, § 170; 1930, § 168; 1942, § 2724.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

There is no statute such as this section [Code 1942, § 2724], which preserves the status quo of an attachment in chancery after an appeal has been taken. *General Acceptance Corp. v. Holbrook*, 189 So. 2d 923, 1966 Miss. LEXIS 1385 (Miss. 1966).

This section [Code 1942, § 2724] authorizes an appeal, and provides for the effect thereof, only in the case discharging the attachment. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270, 1940 Miss. LEXIS 189 (Miss. 1940). But see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

This section [Code 1942, § 2724] does

not authorize an appeal from an order or a judgment vacating a writ of garnishment and dismissing the suit as to a garnishee where the garnishment is issued as a part of an attachment writ in a suit which is still pending in the trial court at the time the appeal is allowed. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270, 1940 Miss. LEXIS 189 (Miss. 1940). But see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Judgment for defendant on plea in abatement in attachment is appealable, though appeal is not taken within ten days after adjournment of the term. *Chas. Brooks & Co. v. Gentry*, 108 Miss. 447, 66

So. 812, 1914 Miss. LEXIS 214 (Miss. 1914).

And if not prosecuted within the specified time, the lien is discharged. *Lowenstein v. Powell*, 68 Miss. 73, 8 So. 269, 1890 Miss. LEXIS 8 (Miss. 1890).

The statute must be fully complied with or the lien will be discharged. If the appeal bond has but one surety, when two are required, the lien will not be preserved. *Pfiefer & Dreyfus v. Hartman*, 60 Miss. 505, 1882 Miss. LEXIS 90 (Miss. 1882).

§ 11-33-101. Intervention by other creditors.

Any creditor of the defendant in attachment, upon filing a petition under oath, averring that he is a creditor, and that the grounds of attachment alleged are untrue, or that the attachment was sued out by collusion between the plaintiff and the defendant, or that the debt claimed by the defendant is fictitious or simulated, in whole or in part, or any other fact showing fraud or collusion in suing out the attachment, may intervene and make defense, and in such case the facts stated in the petition shall be tried; but the intervening creditor must give bond, payable to the plaintiff, in such penalty and with such sureties as the court or judge may prescribe, conditioned to pay the costs of the trial in case the issue be found against him.

HISTORY: Codes, 1892, § 174; 1906, § 179; Hemingway's 1917, § 171; 1930, § 169; 1942, § 2725.

Cross References — Intervention of creditors in an attachment action instituted against the debtor, see Miss. R. Civ. P. 24.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The intervener cannot defeat the whole attachment by showing that a part only of the debt is not due, the purpose of the section [Code 1942, § 2725] being to afford him protection only to the extent that he avers and proves that the debt is not due. *First Nat'l Bank v. Solomon*, 71 Miss. 889, 16 So. 302, 1894 Miss. LEXIS 28 (Miss. 1894).

The issue presented is between the intervener, proceeding in his own name, and the plaintiff. Defendant is not a party, and is not concluded by a judgment in favor of plaintiff as against the intervener. *First Nat'l Bank v. Solomon*, 71 Miss. 889, 16 So. 302, 1894 Miss. LEXIS 28 (Miss. 1894).

Creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor, and to subject the attached property to their demands, notwithstanding

they have a remedy at law by intervening and contesting the attachments. *McBride v. Adams*, 70 Miss. 716, 12 So. 699 (Miss. 1893).

A creditor intervening cannot object to the insufficiency of the declaration or the absence of an itemized account. The truth of the allegations of the petition is the only issue to be tried. *First Nat'l Bank v. Cochran*, 71 Miss. 175, 14 So. 439, 1893 Miss. LEXIS 167 (Miss. 1893); *First Nat'l Bank v. Solomon*, 71 Miss. 889, 16 So. 302, 1894 Miss. LEXIS 28 (Miss. 1894).

On the trial of the attachment issue, the plaintiff's affidavit having alleged fraudulent conduct of the debtor, evidence of the latter's rating or want of rating by commercial agencies, unconnected with any conduct of the debtor on which it was based, was properly excluded as irrelevant. *Lowenstein v. Aaron*, 69 Miss. 341, 12 So. 269, 1891 Miss. LEXIS 108 (Miss. 1891).

RESEARCH REFERENCES

ALR.

Right of successful intervener or claimant of property to attorneys' fees for wrongful attachment. 65 A.L.R.2d 1426.

CJS.

7 C.J.S., Attachment §§ 576-578 et seq.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 509-519.

§ 11-33-103. But one trial.

But one trial shall be allowed under the provisions of Section 11-33-101, unless the petitions of the intervenors present different issues; and if the judgment be in favor of the intervening creditor, he shall recover of the plaintiff and his sureties the costs of suit, and the attachment shall be dissolved.

HISTORY: Codes, 1892, § 175; 1906, § 180; Hemingway's 1917, § 172; 1930, § 170; 1942, § 2726.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR.

Lack or insufficiency of allegations of plaintiff's residence or domicile as ground

for vacation of, or collateral attack on, divorce decree. 55 A.L.R.2d 1263.

§ 11-33-105. Proceedings before justice court judge.

Justice court judges shall have cognizance of attachments in all cases where the amount in controversy is within their jurisdiction. In such case, the notice to a defendant not found shall require the appearance of the defendant at some reasonable time, to be fixed by the judge, not less than one (1) month after the return day of the attachment, and shall be transmitted by such judge by mail to the defendant at his post office, when stated. Such notice shall not be published in a newspaper, but shall be posted in three (3) public places, where they will be likely to be seen by persons in the county of the justice court judge, three (3) weeks before the time for the appearance of the defendant. Such mailing and posting, or posting alone when the post office is not stated, shall be in lieu of publication in a newspaper in attachments before a justice court judge, and shall authorize such further proceedings as are provided for in other cases of publication.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (13); 1857, ch. 52, art. 41; 1871, § 1481; 1880, § 2472; 1892, § 176; 1906, § 181; Hemingway's 1917, § 173; 1930, § 171; 1942, § 2727; Laws, 1981, ch. 471, § 36; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Proceedings in replevin, attachment, and enforcement of liens, see § 11-9-135.

Writ in attachment proceedings, see §§ 11-33-17, 11-33-19.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

On direct attack on judgment against defendant in attachment, defendant has burden to show meritorious defense and that statutory notices were not, in fact, posted. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717, 1934 Miss. LEXIS 132 (Miss. 1934).

Failure to establish by proof that defendant received notice of attachment proceedings while she was nonresident of State held not to affect validity of proceedings under attachment, where proof showed that notice of attachment was properly mailed to her true address. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717, 1934 Miss. LEXIS 132 (Miss. 1934).

Where judgment of justice of peace in attachment proceeding adjudicated that notice was given to nonresident defendant by mail addressed to post office address, there was no presumption that service of notice was completed by posting notices. *Wentworth v. Flowers*, 163 Miss. 39, 139 So. 624, 1932 Miss. LEXIS 14 (Miss. 1932).

Where judgment in attachment proceeding in justice of peace court was not

based on sufficient notice to nonresident defendant to require his appearance, it was void, and sale conferred no title on purchaser. *Wentworth v. Flowers*, 163 Miss. 39, 139 So. 624, 1932 Miss. LEXIS 14 (Miss. 1932).

A justice of the peace has jurisdiction to issue the writ and try the cause in an attachment suit against a nonresident, although the only property attached is in another district of the county; and this, too, where there is a qualified and acting justice in such other district. *Griggs v. Jesse French Piano & Organ Co.*, 70 Miss. 211, 14 So. 24, 1892 Miss. LEXIS 143 (Miss. 1892).

If plaintiff loses an attachment suit in a justice court and appeals, the circuit court has jurisdiction, though after dismissal by the plaintiff, to allow claimant's issues to be made up and tried, although no trial thereof was had in the justice court, for the appeal of the plaintiff on the main ground carries with it all such ancillary issues as are necessary to determine the proper disposition of the property. *Dreyfus v. Mayer*, 69 Miss. 282, 12 So. 267, 1891 Miss. LEXIS 107 (Miss. 1891).

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace § 11.

CJS.

51 C.J.S., Justices of the Peace § 83.

§ 11-33-107. Trial before justice of the peace.

On the return of an attachment before a justice of the peace, the defendant may file an affidavit, or plea sworn to, traversing the grounds on which the attachment was sued out, and the justice shall hear all evidence adduced by

either party, as to whether said attachment was wrongfully sued out or not; and, if the same was wrongfully sued out, he shall dismiss the attachment, with costs, and shall give judgment against the plaintiff for such damages as the defendant may have sustained by the wrongful suing out of said attachment, and shall proceed to hear the case on the merits.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (24); 1857, ch. 52, art. 42; 1880, § 2474; 1892, § 177; 1906, § 182; Hemingway's 1917, § 174; 1930, § 172; 1942, § 2728.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d, Justices of the Peace
§ 11.

CJS.

51 C.J.S., Justices of the Peace § 83.

CHAPTER 35.

GARNISHMENT

Sec.	
11-35-1.	When issued on judgment or decree.
11-35-3.	When issued on suing out attachment.
11-35-5.	Form for writ of garnishment on judgment or decree.
11-35-7.	Form of the writ of garnishment—when issued by the sheriff.
11-35-9.	Service.
11-35-11.	Service of writs of garnishment on government employees.
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§ 11-35-1. When issued on judgment or decree.

On the suggestion in writing by the plaintiff in a judgment or decree in any court upon which an execution may be issued, that any person, either natural or artificial, including the state, any county, municipality, school district, board or other political subdivision thereof, is indebted to the defendant therein, or has effects or property of the defendant in his, her or its possession, or knows of some other person who is indebted to the defendant, or who has effects or property of the defendant in his, her or its possession, it shall be the duty of the clerk of such court to issue a writ of garnishment, directed to the sheriff or proper officer, commanding him to summon such person, the state, county,

municipality, school district, board or other political subdivision thereof, as the case may be, as garnishee to appear at the term of court to which the writs of garnishment may be returnable, to answer accordingly.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 7 (1); 1857, ch. 61, art. 313; 1871, § 874; 1880, § 1738; 1892, § 2130; 1906, § 2337; Hemingway's 1917, § 1932; 1930, § 1838; 1942, § 2783; Laws, 1936, ch. 321; Laws, 1990, ch. 378, § 1, eff from and after July 1, 1990.

Cross References — Fieri facias or garnishment on decrees for money, see § 11-5-81.

Judgments in circuit court, see § 11-7-169 et seq.

Form of writ of garnishment on a judgment or decree, see § 11-35-5.

Execution and garnishment on certain judgments and decrees of other courts, see § 13-3-155.

Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

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1. In general.

This section is the equivalent of a direct action statute which simply permits a suit against the insurer, without joining the insured. *Boston v. Titan Indem. Co.*, 34 F. Supp. 2d 419, 1999 U.S. Dist. LEXIS 882 (N.D. Miss.), dismissed without op., 199 F.3d 437, 1999 U.S. App. LEXIS 31605 (5th Cir. Miss. 1999).

28 USCS § 1331 does not confer Federal District Court with subject matter

jurisdiction with respect to garnishment proceeding, since action for writ of garnishment arises from state law, not federal law. *Berry v. McLemore*, 795 F.2d 452, 1986 U.S. App. LEXIS 27593 (5th Cir. Miss. 1986).

Insurance company against which suggestion of garnishment is filed by judgment creditor is entitled to summary judgment dismissing cause with prejudice where judgment creditor admits in answer to company's motion for summary judgment that creditor is seeking to garnish proceeds from wrong company. *Briggs v. Benjamin*, 467 So. 2d 932, 1985 Miss. LEXIS 2023 (Miss. 1985).

Section 11-35-1 allows a creditor to proceed against another said to be indebted to the creditor's debtor only after the creditor has obtained a judgment against such debtor. *First Mississippi Nat'l Bank v. KLH Industries, Inc.*, 457 So. 2d 1333, 1984 Miss. LEXIS 1978 (Miss. 1984).

Mississippi garnishment proceedings are removable to federal court. *Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 1975 U.S. Dist. LEXIS 16141 (S.D. Miss. 1975).

A judgment in favor of the plaintiff in a personal injury suit was a final judgment against the defendant within the "no-action" clause of the defendant's policy although an appeal was pending, where the defendant in appealing, filed no super-

sedeas bond, so that a garnishment determination that the defendant's liability insurer was indebted to the defendant and was subject to garnishment was justified, although the garnishee insurer was only liable for the amount of its insurance contract plus interest and damages. *Williams v. Moran*, 233 So. 2d 110, 1970 Miss. LEXIS 1648 (Miss. 1970).

The issue whether a judgment creditor wrongfully caused the issuance of a garnishment which was served upon the judgment debtor's employer, resulting in the debtor's discharge, was a question which should be submitted to a jury for its determination. *Wilkerson v. Randall*, 254 Miss. 546, 180 So. 2d 303, 1965 Miss. LEXIS 965 (Miss. 1965).

Where garnishment is concerned only with proceeds of C.O.D. collections in interstate commerce, this does not constitute an unreasonable interference with interstate commerce. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29, 1951 Miss. LEXIS 422 (Miss. 1951).

Procedure in suit in chancery court against nonresident debtor must be in accord with that of chancery court. *Inman v. Travelers' Ins. Co.*, 153 Miss. 405, 121 So. 107, 1929 Miss. LEXIS 30 (Miss. 1929).

The chapter on garnishment and the independent chapter on exemptions must be so construed as to give harmonious effect to both. *Chapman v. Berry*, 73 Miss. 437, 18 So. 918, 1895 Miss. LEXIS 107 (Miss. 1895).

2. Nature and effect of proceeding.

Writ of attachment in chancery may not be used as independent basis for default judgment. *Federal Sav. & Loan Ins. Corp. v. S. & W. Constr. Co.*, 475 So. 2d 145, 1985 Miss. LEXIS 2314 (Miss. 1985).

Where there is no contingency as to the garnishee's liability, the only contingency being as to the amount of it, and where the amount of liability is capable of definite ascertainment, there is no contingency to prevent garnishment of the claim. *American Nat'l Ins. Co. v. United States Fidelity & Guaranty Co.*, 215 So. 2d 245, 1968 Miss. LEXIS 1343 (Miss. 1968).

A subrogee is entitled to the benefit of all the remedies of the subrogor, and may

use all of the means which the subrogor could employ to enforce payment, including garnishment. *American Nat'l Ins. Co. v. United States Fidelity & Guaranty Co.*, 215 So. 2d 245, 1968 Miss. LEXIS 1343 (Miss. 1968).

Various types of insurance policies have been recognized as subject to garnishment, and there is no reason why in a proper case the proceeds of an employees' fidelity bond would not be so subject. *American Nat'l Ins. Co. v. United States Fidelity & Guaranty Co.*, 215 So. 2d 245, 1968 Miss. LEXIS 1343 (Miss. 1968).

The judgment creditor succeeds to the rights of the judgment debtor in a garnishment proceeding. *United States Fire Ins. Co. v. Coggins*, 195 So. 2d 482, 1967 Miss. LEXIS 1444 (Miss. 1967).

In a garnishment proceeding, it is the obligation which is attached and the form of action does not determine the character of obligation. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29, 1951 Miss. LEXIS 422 (Miss. 1951).

Garnishment does not extend the lien of the judgment upon which it is founded. *Grace v. Pierce*, 127 Miss. 831, 90 So. 590, 1921 Miss. LEXIS 286 (Miss. 1921).

A garnishment is not an original suit in reference to jurisdictional amount. *Martin v. Harvey*, 54 Miss. 685, 1877 Miss. LEXIS 81 (Miss. 1877).

3. Suggestion of garnishment.

Method of pleading suggestion for garnishment prescribed in § 11-35-1 et seq. is simple and consistent with what is required in Mississippi Rule of Civil Procedure 8; on other hand, requirement of Rule 9(c) relating to pleading of conditions precedent is foreign to statutory garnishment procedures and as such may not be enforced in garnishment action. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323, 1985 Miss. LEXIS 2184 (Miss. 1985).

Allegation in suggestion of garnishment filed by judgment creditor in automobile negligence suit against judgment debtor's automobile liability carrier that carrier had insurance policy with judgment debtor in full force and effect at time of auto accident is sufficient in substance to allege fulfillment of all conditions precedent to recovery under policy. *Leader*

Nat'l Ins. Co. v. Lindsey, 477 So. 2d 1323, 1985 Miss. LEXIS 2184 (Miss. 1985).

Judgment creditor may, if the facts justify it, suggest any one or more of the four grounds for garnishment to be answered by the garnishee, and a suggestion of garnishment alleging only two of the statutory grounds, instead of all four grounds, is sufficient. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817, 1934 Miss. LEXIS 23 (Miss. 1934).

Judgment creditor, in suggestion of garnishment against foreign insurance corporation, need not allege that garnishee is authorized and is doing business in state, but must prove such fact. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817, 1934 Miss. LEXIS 23 (Miss. 1934).

4. Service and return of process.

Certified copy of appointment of Insurance Commissioner as agent for foreign corporation for service of process held sufficient proof of such fact as basis for service of writ of garnishment. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817, 1934 Miss. LEXIS 23 (Miss. 1934).

The presence of the garnishee within the state where service is had upon him gives the court jurisdiction of his person. *Southern P. R. Co. v. A. J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, 1911 Miss. LEXIS 188 (Miss. 1911).

A justice of the peace having two separate places in the county to hold his regular courts may properly make a writ of garnishment returnable to either of said places although he holds an intervening term at the other place. *Edwards v. Kingston Lumber Co.*, 92 Miss. 598, 46 So. 69, 1908 Miss. LEXIS 207 (Miss. 1908).

Where a writ of garnishment omits to require an answer in writing, or to require the garnishee to answer whether he was indebted to defendant at the time of the summoning of the garnishee, or since that time or whether he has since had effects of defendant, a return by the officer that he had handed to the garnishee "a true notice of the within" is sufficient, since notice of everything in the writ would not be a compliance with the statute which entitled the garnishee to "notice the writing" of the answer he is required to make. A judgment by default on such return will be

reversed. *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. 657, 1892 Miss. LEXIS 64 (Miss. 1892).

A garnishee may waive the service, and if so, his answer will be sufficient if it relate only to the time of answering. *Roy v. Heard & Simmons*, 38 Miss. 544, 1860 Miss. LEXIS 25 (Miss. 1860).

A garnishment, as to the garnishee, is original process and must be executed as such. *Jefferies v. Harvie*, 38 Miss. 97, 1859 Miss. LEXIS 96 (Miss. 1859); *Roy v. Heard & Simmons*, 38 Miss. 544, 1860 Miss. LEXIS 25 (Miss. 1860); *Hoffman v. Levi Simon & Co.*, 52 Miss. 302, 1876 Miss. LEXIS 214 (Miss. 1876).

5. Persons subject to garnishment.

A judgment creditor in an automobile accident case was not entitled to a writ of garnishment against the insurer of an automobile which had been driven by the uninsured judgment debtor, the judgment debtor being a stranger to the policy containing the uninsured motorist coverage issued by the insurer to the owner of the automobile, and the judgment creditor's only resort would be to prove his case against the insurer in a direct action against the insurer. *St. Paul Fire & Marine Ins. Co. v. Arnold*, 254 So. 2d 872, 1971 Miss. LEXIS 1522 (Miss. 1971).

If a creditor can enforce a claim against his debtor in a certain jurisdiction, that claim can be garnished, and the debtor summoned as garnishee in that jurisdiction in an action against the creditor. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29, 1951 Miss. LEXIS 422 (Miss. 1951).

Jurisdiction to attach or garnish a debt is not dependent upon the abstract conception of the situs of the indebtedness in question, but rather upon the power of the court over the person of the garnishee, and more particularly upon the liability of the garnishee to suit in such courts by its creditor. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29, 1951 Miss. LEXIS 422 (Miss. 1951).

Where property is devised to one with the request that he shall pay an annuity to a third person, by accepting the provisions of the will the devisee becomes the debtor of such person and may be garnished. *Red v. Powers*, 69 Miss. 242, 13 So. 586, 1891 Miss. LEXIS 133 (Miss. 1891).

6. State and municipal corporations.

Where a writ of garnishment has been properly served upon a county through its chancery clerk and it appeared that the county was indebted to the judgment debtor for labor and services performed for the county each month since the date of the service of the writ, it was the duty of the chancery clerk, representing the board of supervisors, to make proper answer to the writ, including the amount of the monthly payments, in order that a proper judgment could be obtained in case the amount due under the warrants to be issued to the debtor was above the exemption allowed him by law. *Dunlop Tire & Rubber Corp. v. Williams*, 251 Miss. 442, 169 So. 2d 783, 1964 Miss. LEXIS 362 (Miss. 1964).

Tendency of the legislature has been to enlarge the right of garnishment against public bodies, such as the State, counties and municipalities, even in law cases. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

7. —Under prior law.

A public officer's salary in the hands of the Government is not subject to garnishment. *Scruggs v. Electric Paint & Varnish Co.*, 140 Miss. 615, 105 So. 745 (Miss. 1925).

A municipality, unless subjected thereto by statute, is not liable to a suit by garnishment or otherwise for debts arising from its exercise of governmental functions. *Clarksdale Compress & Storage Co. v. W. R. Caldwell Co.*, 80 Miss. 343, 31 So. 790, 1902 Miss. LEXIS 254 (Miss. 1902).

A plaintiff who seeks to subject a municipality to garnishment on the ground that its debt to the defendant was contracted in its private capacity and not in the exercise of governmental functions must show the nature of the transaction and the facts which render it amenable to the process. *Clarksdale Compress & Storage Co. v. W. R. Caldwell Co.*, 80 Miss. 343, 31 So. 790, 1902 Miss. LEXIS 254 (Miss. 1902).

A county cannot be garnished either at law or in equity if its board of supervisors object. *Dollar v. Allen West Com. Co.*, 78 Miss. 274, 28 So. 876, 1900 Miss. LEXIS 116 (Miss. 1900).

8. Property subject to garnishment.

A joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which evidence is admissible to show what portion of the funds is actually owned by each depositor. *Delta Fertilizer, Inc. v. Weaver*, 547 So. 2d 800, 1989 Miss. LEXIS 366 (Miss. 1989).

Where the evidence established that the funds paid into court in a garnishment proceeding were for the purchase price of raw milk sold by the defendants to a dairy corporation, the defendants were not employees of the corporation and the funds were not for personal services, and consequently the tenth subsection of Code 1942, § 307, was inapplicable. *Beam v. Greenville Mills*, 215 So. 2d 253, 1968 Miss. LEXIS 1345 (Miss. 1968).

A debt or claim which is uncertain or contingent, in the sense that it may never become due and payable, is not garnishable; and under this theory, a claim for unliquidated damages cannot be reached by garnishment process. *American Nat'l Ins. Co. v. United States Fidelity & Guaranty Co.*, 215 So. 2d 245, 1968 Miss. LEXIS 1343 (Miss. 1968).

The statute authorizing garnishment of a county does not operate to subject the fees of public officers to garnishment proceedings. *Bearry v. Stringfellow*, 247 Miss. 683, 157 So. 2d 491, 1963 Miss. LEXIS 344 (Miss. 1963).

Contents of safety deposit box rented by judgment debtor in garnishee bank held subject to garnishment as property in "possession or control" of garnishee bank. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749, 1934 Miss. LEXIS 353 (Miss. 1934).

Debtor renting safety deposit box in garnishee bank may obtain court order protecting his right of privacy as to personal papers of confidential nature contained within box. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749, 1934 Miss. LEXIS 353 (Miss. 1934).

An unliquidated liability for damages, because of a tort, is not subject to garnishment either at law or in equity. *Blair v. Kansas C., M. & B. R. Co.*, 76 Miss. 478, 24 So. 879, 1898 Miss. LEXIS 110 (Miss. 1898).

A debt due by a stockholder in an insolvent corporation, who has not paid up his

stock, may be reached by garnishment. *Scott v. Windham*, 73 Miss. 76, 16 So. 206, 1895 Miss. LEXIS 75 (Miss. 1895).

A judgment debtor of a debtor can be garnished. *Gray v. Henby*, 9 Miss. 598, 1844 Miss. LEXIS 24 (Miss. 1844); *O'Brien v. Liddell*, 18 Miss. 371, 1848 Miss. LEXIS 95 (Miss. 1848).

9. —Partnership property.

Where a survivor of a mercantile firm continues business in the firm name, it not being shown that he had authority to do so, debts thereafter accruing in the business, though nominally due to the firm, are subject to garnishment by his individual creditors. *Brenner v. Hirsche*, 69 Miss. 309, 13 So. 730, 1891 Miss. LEXIS 155 (Miss. 1891).

10. —Debt due several persons jointly.

A debt due to several persons jointly, but not as partners, may be garnished by a creditor of one of them in view of Code 1892, §§ 751, 752 and 2143. *Fewell v. American Surety Co.*, 80 Miss. 782, 28 So. 755, 1902 Miss. LEXIS 213 (Miss. 1902).

11. —Property in hands of agent.

Where a mercantile business was conducted under the name of "Ormond Grocery Co.," without a sign disclosing its owner, the proceeds of a policy of fire insurance on goods acquired and used in such business and burned, is liable to the creditors of the party who transacted the business, although in truth he was the agent of an undisclosed principal, and may be garnished by them. *Meridian Land & Industrial Co. v. J. B. Ormond & Co.*, 82 Miss. 758, 35 So. 179, 1903 Miss. LEXIS 192 (Miss. 1903).

12. —Property in custody of the law.

Money lawfully taken from arrested person by sheriff held subject to garnishment. *Blaylock v. J. Rubel & Co.*, 119 So. 503, 1928 Miss. LEXIS 395 (Miss. 1928).

Money in the hands of a sheriff under execution is subject to garnishment. *Laurel Mills v. Ward*, 137 Miss. 221, 102 So. 263, 1924 Miss. LEXIS 221 (Miss. 1924).

A constable having money collected by him under execution, which is payable to the plaintiff therein, is subject to garnish-

ment. *Burleson v. Milan*, 56 Miss. 399, 1879 Miss. LEXIS 136 (Miss. 1879).

13. Assignment or transfer before garnishment.

A third person claimant's defense that the debts garnished had been transferred raised a question of fact for the jury as to the bona fides of such transfer. *Reeves Grocery Co. v. Thompson*, 105 Miss. 729, 63 So. 187, 1913 Miss. LEXIS 244 (Miss. 1913).

A creditor of a nonresident corporation, which has been consolidated into a new nonresident one, may attach the new corporation and garnish a debt to the old company. *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 So. 723, 1901 Miss. LEXIS 75 (Miss. 1901).

A valid assignment of a judgment will defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor, although when the garnishment was served such debtor had no notice of the assignment. *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. 528, 1893 Miss. LEXIS 190 (Miss. 1893).

14. Priority.

When a written notice of a claim to a fund by laborers has been served subsequent to a writ of garnishment, the garnishment being the first in time is first in right. *Herrin v. Warren & Mobley*, 61 Miss. 509, 1894 Miss. LEXIS 60 (Miss. 1894).

15. Claim of garnishee against defendant.

The garnishee would have the right to set off any debt due him from the judgment debtor, but it must be actually applied to garnishee's debt; and if not applied, but paid to the debtor, such payment would be at the peril of the garnishee. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363, 1928 Miss. LEXIS 283 (Miss. 1928).

A garnishee should plead specifically a claim for damages against defendant, but if he fails, and proof is admitted without specific objections to his damages as an offset, the plaintiff waives the special plea. *Melton Hardware Co. v. Heidelberg*, 91 Miss. 598, 44 So. 857, 1907 Miss. LEXIS 158 (Miss. 1907).

16. Judgment against garnishee.

Variance between name of defendant in judgment on which garnishment was issued and that stated in the suggestion for, and the writ of, garnishment, and in the judgment thereon, rendered the judgment against the garnishee void and was not a mere error which, under Code 1942, § 1347, was released by garnishee suing out an injunction restraining writ of execution. *Campbell v. Yazoo & M. V. R. Co.*, 199 Miss. 309, 24 So. 2d 531, 1946 Miss. LEXIS 199 (Miss. 1946).

A judgment by default against a garnishee cannot be sustained where the original judgment was void and will be reversed on appeal. *Copiah Hardware Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375, 1924 Miss. LEXIS 127 (Miss. 1924).

The validity of a judgment against garnishee is dependent upon the validity of the judgment in the main action. *Moody & Williams v. Dye*, 125 Miss. 770, 88 So. 332, 1921 Miss. LEXIS 165 (Miss. 1921).

No greater interest can be acquired by a

judgment creditor by garnishment than the debtor himself had in funds or property. *Shuler v. Murphy*, 91 Miss. 518, 44 So. 810, 1907 Miss. LEXIS 145 (Miss. 1907).

A garnishment upon a judgment against the "Southern Insurance Company of New Orleans" is not void and the garnishee cannot escape liability because the record does not show whether the defendant in the judgment is a corporation, natural person or a partnership. *Winner v. McMullan*, 77 Miss. 662, 27 So. 618 (Miss. 1900).

The judgment against the garnishee must not be larger than the judgment against the original defendant. *Hoffman v. Levi Simon & Co.*, 52 Miss. 302, 1876 Miss. LEXIS 214 (Miss. 1876).

17. Limitations.

If the original judgment is barred by statute of limitations the garnishment proceedings thereon will be void. *Grace v. Pierce*, 127 Miss. 831, 90 So. 590, 1921 Miss. LEXIS 286 (Miss. 1921).

RESEARCH REFERENCES**ALR.**

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action. 14 A.L.R.2d 420.

Funds deposited in court as subject of garnishment. 1 A.L.R.3d 936.

Attachment and garnishment of funds in branch bank or main office of bank having branches. 12 A.L.R.3d 1088.

Issues in garnishment as triable to court or to jury. 19 A.L.R.3d 1393.

Liability of creditor for excessive attachment or garnishment. 56 A.L.R.3d 493.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt. 36 A.L.R.4th 824.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee. 20 A.L.R.5th 229.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' line statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

Construction and application of 42 USCS § 659(a) authorizing garnishment against United States or District of Columbia for enforcement of child support and alimony obligations, 44 A.L.R. Fed. 494.

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 201 et seq.

CJS.

38 C.J.S., Garnishment §§ 11 et seq.

§ 11-35-3. When issued on suing out attachment.

If, at the time of issuing a writ of attachment, or thereafter before the attachment issue has been tried, the attaching creditor shall suggest that any person is indebted to the debtor, or has property of the debtor in his hands, or knows of any other person so indebted or who has effects or property of the debtor in his hands, the officer issuing the writ of attachment shall insert therein a command to summon such person to appear on the return day of the attachment, to answer accordingly.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (6); 1857, ch. 52, art. 4; 1871, § 1430; 1880, § 2422; 1892, § 2131; 1906, § 2338; Hemingway's 1917, § 1933; 1930, § 1839; 1942, § 2784.

Cross References — Attachment in chancery against nonresident, absent or absconding debtors, see § 11-31-1 et seq.

Attachment at law against debtors, see § 11-33-1 et seq.

What writ is to be served upon and what is bound by the levy, see § 11-33-23.

Form of writ of garnishment when issued by the sheriff, see § 11-35-7.

Enrolling a judgment, see § 27-65-57.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Plaintiff in attachment has burden of proof. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866, 1916 Miss. LEXIS 6 (Miss. 1916).

A writ of garnishment issued under this section which fails to notify the party garnished to make answer in writing, will not support a judgment by default against the garnishee. *Work Bros. & Co. v. Waggoner*, 82 Miss. 591, 35 So. 137, 1903 Miss. LEXIS 174 (Miss. 1903).

Sections 136, 140 (Code of 1890), authorizing officers to summon garnishees by writs of garnishment, issued and served by themselves, does not destroy or abridge the power conferred by this section [Code 1942, § 2784] on circuit clerks or other officers who issue attachments, to insert an order for garnishment as part thereof. *C. C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (Miss. 1893).

If a circuit clerk or other officer who issued the original attachment writ afterward, on suggestion of plaintiff, issues a simple writ of garnishment for designated persons, instead of an alias writ of attachment and garnishment, the writ is not void, but merely defective, and may be amended. *C. C. Kelly Banking Co. v. Hol-*

lingsworth, 71 Miss. 141, 13 So. 932 (Miss. 1893).

Where a writ of attachment embodies a garnishment, but the sheriff, instead of summoning the garnishee thereunder, issues and serves an independent writ of garnishment, the latter writ is not invalid, though unnecessary. *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. 657, 1892 Miss. LEXIS 64 (Miss. 1892); *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904, 1894 Miss. LEXIS 120 (Miss. 1894).

In case the writ show on its face that a certain person has been suggested for garnishment, the sheriff must summon him even if there be no direct command in the writ to do so. *Semmes v. Patterson*, 65 Miss. 6, 3 So. 35, 1887 Miss. LEXIS 3 (Miss. 1887).

No man can be cited as garnishee beyond the jurisdiction of his own state unless he holds property or holds a debt due and payable in the jurisdiction where garnished. *Bush v. Nance*, 61 Miss. 237, 1883 Miss. LEXIS 116 (Miss. 1883).

A garnishee cannot object to irregularities in proceedings against the principal debtor, unless they are such as to render the judgment void, and if the garnishment

does not name the garnishees the return must, but a return of "executed" is sufficient on a writ which gives the name.

Benson v. Holloway, 59 Miss. 358, 1881 Miss. LEXIS 134 (Miss. 1881).

RESEARCH REFERENCES

ALR.

What is an action for "debt" within attachment or garnishment statute. 12 A.L.R.2d 787.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee. 20 A.L.R.5th 229.

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 201 et seq.

§ 11-35-5. Form for writ of garnishment on judgment or decree.

The writ of garnishment, when issued on a judgment or decree, may be in the following form, to wit:

"THE STATE OF MISSISSIPPI.

"To any lawful officer of _____ county:

"Whereas, _____ recovered a judgment in _____ court of _____ county, on the _____ day _____, A. D. _____, for the sum of _____ dollars and costs, against _____, and the judgment has not been satisfied, and said _____ having made the proper suggestion for a writ of garnishment against _____:

"We therefore command you to summon said _____ to appear in said court, at _____, on the _____ day of _____, A. D. _____, then and there to answer, on oath in writing, whether (here copy in full every particular that a garnishee is required to answer). And have you then and there this writ, with your proceedings indorsed thereon.

"Witness my signature (and if by a clerk, add an official seal), this _____ day of _____, A. D. _____."

The writ must be signed by the officer who issues it, and his official character should be written after his name.

HISTORY: Codes, 1892, § 2132; 1906, § 2339; Hemingway's 1917, § 1934; 1930, § 1840; 1942, § 2785.

Cross References — When garnishment is issued on judgment or decree, see § 11-35-1.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Judgment creditor may, if facts justify it, suggest any one or more of four grounds for garnishment to be answered by garnishee. Universal Life Ins. Co. v. Catch-

ings, 169 Miss. 26, 152 So. 817, 1934 Miss. LEXIS 23 (Miss. 1934).

Suggestion of garnishment, alleging only two of statutory grounds, instead of all four grounds, held sufficient. Universal

Life Ins. Co. v. Catchings, 169 Miss. 26, 152 So. 817, 1934 Miss. LEXIS 23 (Miss. 1934).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 304 et seq.

Garnishment, 2 Am. Jur. Pl and Pr Forms (Rev), Attachment and Garnishment, Forms 221 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 211 et seq.

CJS.

38 C.J.S., Garnishment §§ 176 et seq.

§ 11-35-7. Form of the writ of garnishment—when issued by the sheriff.

When the sheriff issues a writ of garnishment in executing an attachment, it may be in the following form:

“THE STATE OF MISSISSIPPI.

“To _____, garnishee:

“Whereas, the undersigned holds an attachment writ against _____, as defendant at the suit of _____, as plaintiff, and it appearing that you should be summoned as garnishee:

“We therefore command you to appear in the _____ court, at _____, on the _____ day of _____, A. D. _____, being the return day of said attachment, then and there in said attachment suit to answer (here copy in full every particular that a garnishee is required to answer). Herein fail not, under penalty of having judgment rendered against you for the whole amount of plaintiff's demand.

“Witness my signature, this _____ day of _____, A. D. _____.”

The original must be returned to the court properly indorsed with the mode of service and the defendant served, as in other cases.

HISTORY: Codes, 1892, § 2133; 1906, § 2340; Hemingway's 1917, § 1935; 1930, § 1841; 1942, § 2786.

Cross References — Summoning of creditor of judgment debtor in garnishment proceeding, see § 11-35-3.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Sections 136, 140 (Code of 1890), authorizing officers to summon garnishees by writs of garnishment, issued and served by themselves, does not destroy or abridge the power conferred by this section [Code 1942, § 2784] on circuit clerks or other

officers who issue attachments, to insert an order for garnishment as part thereof. *C. C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (Miss. 1893).

If a circuit clerk or other officer who issued the original attachment writ afterward, on suggestion of plaintiff, issues a

simple writ of garnishment for designated persons, instead of an alias writ of attachment and garnishment, the writ is not void, but merely defective, and may be amended. *C. C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (Miss. 1893).

Where a writ of attachment embodies a garnishment, but the sheriff, instead of

summoning the garnishee thereunder, issues and serves an independent writ of garnishment, the latter writ is not invalid, though unnecessary. *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. 657, 1892 Miss. LEXIS 64 (Miss. 1892); *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904, 1894 Miss. LEXIS 120 (Miss. 1894).

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 211 et seq.

§ 11-35-9. Service.

A writ of garnishment, whether issued in a case of attachment or on a judgment or decree, shall be served as a summons is required by law to be executed; but if the garnishee be not personally served, and make default, judgment nisi shall be rendered against him, and a scire facias awarded, returnable to the next term, unless the court be satisfied that the garnishee can be personally served at once, in which case it may be returnable instanter.

HISTORY: Codes, 1892, § 2134; 1906, § 2341; Hemingway's 1917, § 1936; 1930, § 1842; 1942, § 2787.

Cross References — Service of writs on public officer, see § 11-35-11.

Issuing of summons, see § 13-3-5 et seq.

Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Answer to writ.

1. In general.

Not only did a circuit court err when it determined that priority of garnishments under Miss. Code Ann. § 11-35-24 was based on service of the writ rather than the filing of the writ but if prior garnishors' services of process on a garnishee were defective, the date of service for each was the day the garnishee waived the defense of insufficient service of process by filing an answer to that garnishor's writ. However, the court could not assume that

the garnishee waived service of process in the same order that the prior garnishors' attempted service. *Y-D Lumber Co. v. Humphreys County*, 2 So. 3d 793, 2009 Miss. App. LEXIS 68 (Miss. Ct. App. 2009).

Where garnishee was personally served for requisite time before return day, justice of peace on return day could render judgment final. *Busby v. Merchants' & Mfrs' Bank*, 158 Miss. 843, 131 So. 645, 1931 Miss. LEXIS 1 (Miss. 1931).

This section [Code 1942, § 2787] requires a writ of garnishment to be served as a summons, and where the service is within five days of the return-day the garnishee is not required to answer until

the next term. *Alexander v. Lloyd*, 70 Miss. 662, 14 So. 22, 1893 Miss. LEXIS 67 (Miss. 1893).

In such case judgment by default cannot be taken against him before the next term, and the fact that five days have elapsed after service and before entry of the judgment does not change this. *Alexander v. Lloyd*, 70 Miss. 662, 14 So. 22, 1893 Miss. LEXIS 67 (Miss. 1893).

Service of a writ of garnishment not made personally and only two days before the return term cannot support a judgment against the garnishee at the return term. *Alexander v. Equitable Fire Ins. Co.*, 12 So. 706 (Miss. 1893).

2. Answer to writ.

A garnishee purporting to answer a writ of garnishment should disclose whether any indebtedness existed at the time of

the service of writ or thereafter and whether there was any property in the hands of the garnishee and also that the answers must be made under oath. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442, 1955 Miss. LEXIS 547 (Miss. 1955).

In a garnishment action where a letter was written to the court by the garnishee in which he stated that there was no indebtedness due judgment debtor, that fact should have been alleged in garnishee's answer to the writ of garnishment. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442, 1955 Miss. LEXIS 547 (Miss. 1955).

Purpose of judgment nisi against garnishee is to give garnishee opportunity to answer writ in accordance with statute. *Busby v. Merchants' & Mfrs' Bank*, 158 Miss. 843, 131 So. 645, 1931 Miss. LEXIS 1 (Miss. 1931).

RESEARCH REFERENCES

ALR.

Who may serve writ, summons, or notice of garnishment. 75 A.L.R.2d 1437.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 311- 314.

Garnishment, 2 Am. Jur. Pl and Pr

Forms (Rev), Attachment and Garnishment, Forms 241 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 211 et seq.

CJS.

38 C.J.S., Garnishment §§ 177, 206-216.

§ 11-35-11. Service of writs of garnishment on government employees.

Service of writs of garnishment upon judgments against any officer or employee of the state, a county, a municipality, any state institution, board, commission or authority shall be effected as follows:

(1) In a case of garnishment against any employee of a state department, agency, board, commission, institution or other authority, the writ shall be served upon the department head, president of the institution or chairman or other presiding officer thereof. In case of a garnishment against a state officer, departmental head, president of an institution, director of a board or other head of any other agency or commission of the state government, the writ shall be served upon the state auditor. In case of a garnishment against the state auditor, the writ shall be served upon the state treasurer, this being the only case in which the state treasurer is served with a writ of garnishment except where a garnishment is against an employee of the state treasurer.

(2) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county, the writ shall be

served upon the clerk of the chancery court of the county, except that in case of garnishment upon a judgment against such clerk the writ shall be served upon the sheriff of the county.

(3) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county school district or a municipal separate school district, the writ shall be served upon the superintendent of the respective school district, except in the event the garnishment be against such superintendent the writ shall be served upon the president of the board of education or the board of trustees.

(4) In case of a garnishment against an officer or employee of a municipality, the writ shall be served upon the city, town or village clerk.

HISTORY: Codes, 1942, § 2789; Laws, 1936, ch. 321; Laws, 1952, ch. 264; Laws, 1973, ch. 422, § 1, eff from and after passage (approved March 29, 1973).

Editor's Notes — Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor," and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer.

Section 27-104-6 provides that whenever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — Seizure of person or property, see Miss. Rule of Civil Proc. 64.

JUDICIAL DECISIONS

1. In general.

Where a writ of garnishment has been properly served upon a county through its chancery clerk and it appeared that the county was indebted to the judgment debtor for labor and services performed for the county each month since the date of the service of the writ, it was the duty of the chancery clerk, representing the board of supervisors, to make proper answer to the writ including the amount of the monthly payments in order that a proper

judgment could be obtained in case the amount due under the warrants to be issued to the debtor was above the exemption allowed him by law. *Dunlop Tire & Rubber Corp. v. Williams*, 251 Miss. 442, 169 So. 2d 783, 1964 Miss. LEXIS 362 (Miss. 1964).

This section [Code 1942, § 2789] does not operate to subject to garnishment fees allowable to a public officer. *Bearry v. Stringfellow*, 247 Miss. 683, 157 So. 2d 491, 1963 Miss. LEXIS 344 (Miss. 1963).

OPINIONS OF THE ATTORNEY GENERAL

Miss. Code Section 11-35-11 explicitly subjects salaries of county officials to gar-

nishment, but makes no mention of fees. *Wallace*, Feb. 25, 1993, A.G. Op. #92-0981.

§ 11-35-13. Garnishment against public officer or employee; default judgment against state prohibited.

In no case shall judgment be rendered against the state, a county, a municipality or any state institution, board, commission or authority for default in failing to make answer to a writ served hereunder.

HISTORY: Codes, 1942, § 2790; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-15. Garnishment against state public officer or employee; fee for service of writ.

Any person suggesting and obtaining a writ of garnishment upon a judgment against any person who is an officer or employee of the state shall advance and pay the sum of two dollars which shall be paid by the officer serving the writ of garnishment to the state officer upon whom such writ is directed to be served and such payment shall be retained by such officer as compensation for the additional duty imposed upon him by Sections 11-35-1 and 11-35-11 through 11-35-21, in the capacity of such officer as special agent of the state for service of garnishment writs.

HISTORY: Codes, 1942, § 2791; Laws, 1936, ch. 321.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The dash preceding the words “in the capacity” was deleted. The Joint Committee ratified the correction at its December 3, 1996, meeting.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-17. Garnishment against county, municipal or other public officer or employee; fee for service of writ.

Any person suggesting and obtaining a writ of garnishment to issue against any officer or employee of a county, municipality or any state institution, board, commission or authority shall advance and pay the sum of one dollar which shall be paid to the officer upon whom such writ is directed to be served at the time of service of the writ and such sum shall be retained by such officer as compensation for answering the writ of garnishment.

HISTORY: Codes, 1942, § 2792; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

OPINIONS OF THE ATTORNEY GENERAL

Section 11-35-17 limits to one dollar the amount that a local governmental entity such as a school district may receive for answering a garnishment. Haque, March 15, 1995, A.G. Op. #95-0083.

§ 11-35-19. Garnishment against public officer or employee; failure to answer writ; penalty.

Any person upon whom, in his representative capacity as above set out in Section 11-35-11, there shall be served a writ of garnishment under the provisions of Sections 11-35-1 and 11-35-11 through 11-35-21 shall, if he shall

fail or refuse to answer such writ as provided by law in other cases of writs of garnishment and answers thereto forfeit and pay to the plaintiff in the judgment upon which the writ has issued the sum of twenty-five dollars, the same to be recovered in any court of competent jurisdiction.

HISTORY: Codes, 1942, § 2793; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-21. Garnishment against public officer or employee; effect of writ.

Service of writ of garnishment as provided for in Section 11-35-11 shall be effective to bind funds in the hands of the garnishee as in other cases and upon judgment rendered upon the garnishment issue in any court the funds bound, or so much thereof as shall be necessary to pay the judgment upon which garnishment issued and all cost accrued, shall be paid over to the court in which such judgment was rendered and for such payment a properly certified copy of the said judgment in the garnishment proceeding and a certified copy of the bill of costs in such proceedings shall be sufficient warrant and any payment so made shall be charged against the salary or wages of the judgment debtor in the judgment on which writ of garnishment issued.

HISTORY: Codes, 1942, § 2794; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR.

Form of judgment against garnishee respecting obligation payable in instalments. 7 A.L.R.2d 680.

Retirement or pension proceeds or annuity as subject to attachment or garnishment. 28 A.L.R.2d 1213.

Right of creditors of life insured as to options or other benefits available to him during his lifetime. 37 A.L.R.2d 268.

Sharecropper's share in crop wholly or partly unharvested as subject to garnishment. 82 A.L.R.2d 858.

Garnishment of salary, wages, or commissions where defendant debtor is indebted to garnishee-employer. 93 A.L.R.2d 995.

Funds deposited in court as subject of garnishment. 1 A.L.R.3d 936.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint debtors. 11 A.L.R.3d 1465.

§ 11-35-23. Nature and effects of garnishment; property affected.

(1)(a) Except for wages, salary or other compensation, all property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall be bound by and subject to the lien of the judgment, decree or attachment on which the writ shall have been issued. If the garnishee shall surrender such property to the sheriff or other officer

serving the writ, the officer shall receive the same and, in case the garnishment issued on a judgment or decree, shall make sale thereof as if levied on by virtue of an execution, and return the money arising therefrom to satisfy the judgment; and if the garnishment issued on an attachment, the officer shall dispose of the property as if it were levied upon by a writ of attachment. And any indebtedness of the garnishee to the defendant, except for wages, salary or other compensation, shall be bound from the time of the service of the writ of garnishment, and be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment.

(b) If the garnishee is a bank or other financial institution and its indebtedness to the defendant consists of funds that the defendant has on deposit with the bank or other financial institution at the time of service of the writ of garnishment, then the garnishee shall be held to account for only such funds on deposit between the time of service of the writ of garnishment and the time of service of its answer to such writ, and the garnishee shall have no obligation to account for additional deposits accruing after the time of service of its answer. If the bank or other financial institution is not indebted to the defendant at the time of service of the writ of garnishment or does not have possession of property of the defendant at the time of service of such writ, then the bank or other financial institution may serve its answer and thereafter shall not be held to account for any indebtedness that arises subsequent to service of its answer or property that may come into its hands subsequent to such service. The financial institution may submit its Answer of Indebtedness at any time within the thirty (30) days allowed for response.

(2) The court issuing any writ of garnishment shall show thereon the amount of the claim of the plaintiff and the court costs in the proceedings and should at any time during the pendency of said proceedings in the court a judgment be rendered for a different amount, then the court shall notify the garnishee of the correct amount due by the defendant under said writ.

(3)(a) Except for judgments, liens, attachments, fees or charges owed to the state or its political subdivisions; wages, salary or other compensation in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall not be bound by nor subject to the lien of the judgment, decree or attachment on which the writ shall have been issued when the writ of garnishment is issued on a judgment based upon a claim or debt that is less than One Hundred Dollars (\$100.00), excluding court costs.

(b) If the garnishee be indebted or shall become indebted to the defendant for wages, salary or other compensation during the first thirty (30) days after service of a proper writ of garnishment, the garnishee shall pay over to the employee all of such indebtedness, and thereafter, the garnishee shall retain and the writ shall bind the nonexempt percentage of disposable earnings, as provided by Section 85-3-4, for such period of time as is necessary to accumulate a sum equal to the amount shown on the writ as due, even if such period of time extends beyond the return day of the writ.

Unless the court otherwise authorizes the garnishee to make earlier payments or releases and except as otherwise provided in this section, the garnishee shall retain all sums collected pursuant to the writ and make only one (1) payment into court at such time as the total amount shown due on the writ has been accumulated, provided that, at least one (1) payment per year shall be made to the court of the amount that has been withheld during the preceding year. Should the employment of the defendant for any reason be terminated with the garnishee, then the garnishee shall not later than fifteen (15) days after the termination of such employment, report such termination to the court and pay into the court all sums as have been withheld from the defendant's disposable earnings. If the plaintiff in garnishment contest the answer of the garnishee, as now provided by law in such cases, and proves to the court the deficiency or untruth of the garnishee's answer, then the court shall render judgment against the garnishee for such amount as would have been subject to the writ had the said sum not been released to the defendant; provided, however, any garnishee who files a timely and complete answer shall not be liable for any error made in good faith in determining or withholding the amount of wages, salary or other compensation of a defendant which are subject to the writ.

(4) Wages, salaries or other compensation as used in this section shall mean wages, salaries, commissions, bonuses or other compensation paid for employment purposes only.

(5) The circuit clerk may, in his or her discretion, spread on the minutes of the county or circuit court, as the case may be, an instruction that all garnishment defendants shall send all garnishment monies to the attorney of record or in the case where there is more than one (1) attorney of record, then to the first-named attorney of record, and not to the clerk. The payment schedule shall be the same as subsection (3)(b) of this section.

(6) All payments made pursuant to a garnishment issued out of the justice court shall be made directly to the plaintiff or to the plaintiff's attorney as indicated by the plaintiff in his or her suggestion for writ of garnishment. The employer shall notify the court and the plaintiff or the plaintiff's attorney when a judgment is satisfied or when the employee is no longer employed by the employer.

(7) If the plaintiff in a garnishment is the Department of Employment Security, the garnishee shall make monthly payments to the department until such time as the total amount shown due on the writ has been accumulated.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 7 (8); 1857, ch. 61, art. 314; 1871, § 875; 1880, § 1784; 1892, § 2136; 1906, § 2343; Hemingway's 1917, § 1938; 1930, § 1844; 1942, § 2796; Laws, 1981, ch. 469, § 1; Laws, 1997, ch. 533, § 1; Laws, 2000, ch. 497, § 1; Laws, 2004, ch. 475, § 1; Laws, 2007, ch. 606, § 18; Laws, 2017, ch. 407, § 10, eff from and after July 1, 2017.

Cross References — Exempt property, see § 85-3-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Property subject to garnishment.
3. Assignment or transfer prior to garnishment.

1. In general.

County court did not abuse its discretion in ordering garnished funds to be deposited in the court registry in lieu of a supersedeas bond because the amount deposited was more than the 125 percent of the judgment bond requirement; a contractor never obtained a supersedeas bond, but the county court's requiring the garnished funds to be deposited in the court registry had the same effect as a supersedeas bond, to provide absolute security to a company. *Knights Marine & Indus. Servs. v. Gulfstream Enters.*, 216 So. 3d 1164, 2017 Miss. App. LEXIS 207 (Miss. Ct. App. 2017).

Where a party commences a garnishment proceeding when the underlying judgment is still valid, the statute of limitations for actions on judgments is tolled as to that particular party as to funds, due to the judgment debtor, that were in the hands of the garnishee when the garnishment proceeding was initiated and the underlying judgment was valid; a garnisher is not entitled to the funds due to the judgment debtor, which came into the garnishee's hands only after the underlying judgment lapsed. *Quality Diesel Serv. v. Tiger Drilling Co., LLC*, 190 So. 3d 860, 2016 Miss. LEXIS 2 (Miss. 2016).

Trial court erred in granting a limited liability company's (LLC) motion to dismiss a garnishment proceeding because a judgment creditor was not required to renew its underlying judgment against the judgment debtor for it to maintain its timely filed garnishment proceeding against the LLC, who was indebted to the debtor; the creditor brought its action within the seven-year period, and the underlying judgment had not lapsed as to its timely issued writs of garnishment and garnishment contest. *Quality Diesel Serv. v. Tiger Drilling Co., LLC*, 190 So. 3d 860, 2016 Miss. LEXIS 2 (Miss. 2016).

In light of the Supremacy Clause, the statutory language of Section 11-35-23(3) must yield to the unequivocal language of the Bankruptcy Code; therefore, "transfers" effected pursuant to writs of garnishment served prior to the 90-day preference period are avoidable as to those wages not yet actually acquired by the debtor. *Taylor v. Mississippi Learning Inst.*, 151 B.R. 772, 1993 Bankr. LEXIS 418 (Bankr. N.D. Miss. 1993).

A garnishee has the right to surrender garnished property to its true owner or to pay a creditor, but if he surrenders to a person not entitled thereto or pays a garnisher more than the garnisher is entitled to, he is not relieved from liability but will be required to make up any overpayment. *State Farm Mut. Auto. Ins. Co. v. Sampson*, 324 So. 2d 739, 1975 Miss. LEXIS 1596 (Miss. 1975).

Filing of a motion by the purchaser of the properties of an extinct corporation to quash a writ of garnishment and service on the corporation and to substitute the purchaser as garnishee was the equivalent of valid service of the writ on the purchaser so as to bind money belonging to the judgment debtor in the hands of the purchaser from the time of such appearance. *Mississippi Cottonseed Products Co. v. Champion*, 200 Miss. 460, 27 So. 2d 684, 1946 Miss. LEXIS 310 (Miss. 1946).

Service of the writ of garnishment binds any money belonging to the defendant that garnishee may receive between the date of service and the return day of the writ. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363, 1928 Miss. LEXIS 283 (Miss. 1928).

If garnishee paid the judgment debtor his full salary after service of the writ, the garnishee would be liable for such payment, and certainly, if in excess of the legal exemption of the debtor, if any. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363, 1928 Miss. LEXIS 283 (Miss. 1928).

A creditor may proceed to judgment against his debtor notwithstanding the latter has been garnished, but this being shown the judgment should require execution to be stayed for the amount the defendant has been or is sought to be

charged as garnishee. *Yazoo & M. V. R. Co. v. Fulton*, 71 Miss. 385, 14 So. 271, 1893 Miss. LEXIS 166 (Miss. 1893).

Garnishments bind money received between the date of service and return day, and if the plaintiff wishes a disclosure of this he may demand a fuller answer; in that case a reasonable time must be allowed to amend the answer, even if a continuance results, and one day is not enough if the garnishee's domicile is in a distant county. *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74, 1883 Miss. LEXIS 75 (Miss. 1883).

2. Property subject to garnishment.

A bank was liable for failure to withhold the funds of a garnishee in a joint construction account in the names of a homeowner and the garnishee contractor, in which the homeowner deposited funds to pay for labor and materials furnished in construction, in spite of the bank's argument that the funds in the account belonged to the homeowner and not to the contractor, where the contractor was free to write checks as he pleased, he determined whether or not each check should be written, and he wrote checks to pay his own debts. *Deposit Guaranty Nat'l Bank v. Pete*, 583 So. 2d 180, 1991 Miss. LEXIS 390 (Miss. 1991).

A joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which evidence is admissible to show what portion of the funds is actually owned by each depositor. *Delta Fertilizer, Inc. v. Weaver*, 547 So. 2d 800, 1989 Miss. LEXIS 366 (Miss. 1989).

Funds in the possession of the circuit clerk that were received by that office under a mother's garnishment to enforce unpaid child support payments could not be reached in another garnishment proceeding by an entirely disassociated judgment creditor of the mother; moreover, the funds paid to the clerk by the father's employer after garnishment belonged to the child and not to the mother as set out in § 11-35-23. *Lumbermens Mut. Casualty Co. v. Rhodes*, 459 So. 2d 244, 1984 Miss. LEXIS 2000 (Miss. 1984).

Unliquidated claims for damages are not subject to garnishment. *Goodyear Tire & Rubber Co. v. Ross*, 201 Miss. 624, 30

So. 2d 66, 1947 Miss. LEXIS 430 (Miss. 1947).

Compensation of deputy tax assessor which is paid by tax assessor himself held exempt from garnishment. *Pickle v. McLaughlin*, 162 Miss. 693, 139 So. 157, 1932 Miss. LEXIS 116 (Miss. 1932).

A bank deposit in name of an individual followed by "agent" or "trustee" may in action against depositor be garnished, subject to defense that the depositor did not own funds and full disclosure of true owner. *Turner v. Nicholson*, 151 Miss. 18, 117 So. 329, 1928 Miss. LEXIS 273 (Miss. 1928).

Where a mercantile business was conducted under a name without a sign disclosing the real owners, the property used and acquired therein is subject to the debts of the person so transacting the business, and the proceeds of the policy of fire insurance on goods burned while in such use are liable to the creditors of the party who transacted such business and may be garnished. *Meridian Land & Industrial Co. v. J. B. Ormond & Co.*, 82 Miss. 758, 35 So. 179, 1903 Miss. LEXIS 192 (Miss. 1903).

An unliquidated liability for damages because of tort is not subject to garnishment either at law or in equity. *Blair v. Kansas C., M. & B. R. Co.*, 76 Miss. 478, 24 So. 879, 1898 Miss. LEXIS 110 (Miss. 1898).

3. Assignment or transfer prior to garnishment.

Where husband and wife sold land for cash and purchase money notes which the husband assigned to the wife, and a judgment creditor of the husband garnished the purchaser and collected money on his judgment, the wife had no claim against the judgment creditor for any of the money, so collected. *Russell v. Allen*, 110 Miss. 722, 70 So. 890, 1916 Miss. LEXIS 198 (Miss. 1916).

A valid assignment of a judgment will defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor, although when the garnishment was served such debtor had no notice of the assignment. *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. 528, 1893 Miss. LEXIS 190 (Miss. 1893).

Where a railroad company, after receiving notice that an employee in this state has assigned his wages, is summoned as garnishee in a suit against such laborer in another state, and, through neglect of the notice, answers admitting the indebted-

ness, and judgment is rendered against it, the same will be no defense to an action subsequently brought by the assignee of the debt. *Illinois C. R. Co. v. Bryant*, 70 Miss. 665, 12 So. 592, 1893 Miss. LEXIS 14 (Miss. 1893).

OPINIONS OF THE ATTORNEY GENERAL

All garnishment monies should be paid into court before they are disbursed to the judgment creditor. *Tate*, June 3, 1992, A.G. Op. #92-0372.

Garnishment proceeds should be sent directly to the plaintiff or his attorney, not to the justice court. *Denny*, Apr. 29, 2005, A.G. Op. 05-0074.

RESEARCH REFERENCES

ALR.

Form of judgment against garnishee respecting obligation payable in installments. 7 A.L.R.2d 680.

Retirement or pension proceeds or annuity as subject to attachment or garnishment. 28 A.L.R.2d 1213.

Right of creditors of life insured as to options or other benefits available to him during his lifetime. 37 A.L.R.2d 268.

Sharecropper's share in crop wholly or partly unharvested as subject to garnishment. 82 A.L.R.2d 858.

Garnishment of salary, wages, or com-

missions where defendant debtor is indebted to garnishee-employer. 93 A.L.R.2d 995.

Funds deposited in court as subject of garnishment. 1 A.L.R.3d 936.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint debtors. 11 A.L.R.3d 1465.

Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor. 86 A.L.R.5th 527.

§ 11-35-24. Multiple garnishments.

(1) Where more than one garnishment has been issued against an employee of a garnishee, such garnishee shall comply with the garnishment with which he was first served. In the event more than one (1) garnishment on an employee is received on the same day, the writ of garnishment which is the smallest amount shall be satisfied first. However, in every case, garnishments issued pursuant to court ordered child support shall have first priority, even if previous garnishments are in effect or pending.

(2) Any such conflicting or subsequent garnishments on an employee of the garnishee shall be returned to the court issuing such writ of garnishment with a statement by the garnishee that a previous garnishment is in effect. Such statement shall operate as a stay of the subsequent garnishment until satisfaction of any prior garnishments has been made.

(3) Upon satisfaction of the writ of garnishment in progress, the garnishee shall immediately begin collection of such writ of garnishment with next priority.

(4) Good faith compliance with this section shall release the garnishee from any liability for failure of compliance with this section.

HISTORY: Laws, 1981, ch. 469, § 5, eff from and after passage (approved April 7, 1981).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Necessary parties.
2. Priority.

1. Necessary parties.

Circuit court could not fully and completely determine priority of garnishors without first retrying that the creditor join the prior garnishors under Miss. R. Civ. P. 19(a). The prior garnishors had a significant pecuniary interest in the disposition of the creditor's motion to determine priority and the circuit court's subsequent fulfillment of that request. *Y-D Lumber Co. v. Humphreys County*, 2 So. 3d 793, 2009 Miss. App. LEXIS 68 (Miss. Ct. App. 2009).

2. Priority.

Chancery court erred in granting each party involved a portion of the money rather than determining the order of descending priority because the attorney's charging lien attached and had priority

over the third-party garnishors; one garnishor had priority over the other because it was the first to serve a company with a writ of garnishment related to any funds it owed. *Bar-Til, Inc. v. Superior Asphalt, Inc.*, 219 So. 3d 553, 2017 Miss. App. LEXIS 261 (Miss. Ct. App. 2017).

Not only did a circuit court err when it determined that priority of garnishments under Miss. Code Ann. § 11-35-24 was based on service of the writ rather than the filing of the writ but if prior garnishors' services of process on a garnishee were defective, the date of service for each was the day the garnishee waived the defense of insufficient service of process by filing an answer to that garnishor's writ. However, the court could not assume that the garnishee waived service of process in the same order that the prior garnishors' attempted service. *Y-D Lumber Co. v. Humphreys County*, 2 So. 3d 793, 2009 Miss. App. LEXIS 68 (Miss. Ct. App. 2009).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 418, 419 et seq.

CJS.

38 C.J.S., Garnishment § 265.

§ 11-35-25. Answer of the garnishee.

(1) Every person duly summoned as a garnishee shall answer on oath as to the following particulars, viz.:

(a) Whether he be indebted to the defendant or were so indebted at the time of the service of the writ on him, or have at any time since been so indebted; and, if so indebted, in what sum, whether due or not, and when due or to become due, and how the debt is evidenced, and what interest it bears;

(b) What effects of the defendant he has or had at the time of the service of the writ on him, or has had since, in his possession or under his control;

(c) Whether he knows or believes that any other person is indebted to the defendant; and, if so, whom, and in what amount, and where he resides; and

(d) Whether he knows or believes that any other person has effects of

the defendant in his possession or under his control; and, if so, whom, and where he resides.

(2) In addition to answering as to the particulars in subsection (1) of this section, each person duly summoned as a garnishee in any case in which he be indebted to the defendant for wages, salary or other compensation shall answer on oath as to whether the defendant is an employee of the garnishee and, if so, the time interval between pay periods of the defendant including any specific day of a week or month on which such defendant is regularly paid.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (6), ch. 62, art. 7 (1); 1857, ch. 52, art. 4, ch. 61, art. 313; 1871, §§ 874, 1430; 1880, §§ 1783, 2422; 1892, § 2135; 1906, § 2342; Hemingway's 1917, § 1937; 1930, § 1843; 1942, § 2788; Laws, 1981, ch. 469, § 2, eff from and after passage (approved April 7, 1981).

Cross References — Property exempt from seizure under execution or attachment, see § 85-3-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Defects in answer.
3. Debtor's discharge in bankruptcy.
4. Setoff.

1. In general.

A garnishee which failed to file an answer to a writ of garnishment as required by § 11-35-25 and instead paid \$10 per week of the judgment debtor's salary directly to the attorney for the judgment holder was liable to the debtor for monies wrongfully withheld after expiration of the judgment where, although the judgment and execution thereon had expired after seven years as provided in §§ 15-1-3, 15-1-43 and although the judgment holder had failed to file another suit on the judgment prior to the expiration of the seven years as required by § 15-1-47 to extend the judgment lien, the garnishee continued to pay the \$10 per week to the judgment holder for two years after the judgment had lapsed. *Anderson-Tully Co. v. Brown*, 383 So. 2d 1389, 1980 Miss. LEXIS 2023 (Miss. 1980).

A default judgment against a garnishee, who instead of filing a formal answer wrote the clerk of the court a letter which the clerk failed to file or note on the docket, is properly set aside upon the

court's attention being called to the letter. *Thompson v. Thompson*, 236 Miss. 31, 109 So. 2d 530, 1959 Miss. LEXIS 290 (Miss. 1959).

A garnishee purporting to answer a writ of garnishment should disclose whether any indebtedness existed at the time of the service of writ or thereafter and whether there was any property in the hands of the garnishee and also that the answers must be made under oath. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442, 1955 Miss. LEXIS 547 (Miss. 1955).

In a garnishment action where a letter was written to the court by the garnishee in which he stated that there was no indebtedness due judgment debtor, that fact should have been alleged in garnishee's answer to the writ of garnishment. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442, 1955 Miss. LEXIS 547 (Miss. 1955).

As distinguished from garnishee in chancery attachment, garnishee in law garnishment must answer whether it owes, or has in its possession effects of, nonresident defendant, and also must answer whether it knows or believes that any other person is indebted to, or has in his possession effects of such nonresident, and, if so, whom, in what amounts, and where he resides; and garnishee, to protect himself, is also under duty to raise question of exemption of the debtor-defen-

dant, as well as the validity of the judgment on which the garnishment is based. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Judgment creditor may, if facts justify it, suggest any one or more of the four grounds for garnishment herein enumerated. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817, 1934 Miss. LEXIS 23 (Miss. 1934).

Garnishee on return day, if desiring to interpose defense to writ, should file answer setting up defense and not motion to quash writ. *Busby v. Merchants' & Mfrs' Bank*, 158 Miss. 843, 131 So. 645, 1931 Miss. LEXIS 1 (Miss. 1931).

The answer of the garnishee should be a substantial compliance with this statute. *Arky v. Cameron*, 92 Miss. 632, 46 So. 54, 1908 Miss. LEXIS 198 (Miss. 1908).

Where a railroad company contracts with one to build its roadbed and the contractor sublets a part of the work, and the employees of the subcontractor garnish the railroad company, and where the company answers stating the facts and pays the amount of money into the court due the contractor, the defense is complete and the company fully acquitted. *Herrin v. Warren & Mobley*, 61 Miss. 509, 1894 Miss. LEXIS 60 (Miss. 1894).

The garnishees being partners, the answer of one admitting liability is binding on the partnership. *Anderson v. Wanzer*, 6 Miss. 587, 1841 Miss. LEXIS 41 (Miss. 1841).

2. Defects in answer.

Answer of garnishees admitting indebtedness due but alleging that such indebtedness was subject to certain attachments was too vague and indefinite to raise an

issue relative thereto. *Mechanics' & Traders' Ins. Co. v. Butler*, 115 Miss. 476, 76 So. 521, 1917 Miss. LEXIS 221 (Miss. 1917).

If the garnishee file an answer endeavoring to deny liability, though the answer be inartificially drawn or fail to conform strictly to the statute, the plaintiff will not be permitted to strike it from the files and take judgment for his debt, he must except to the answer. *Little v. Nelson*, 61 Miss. 672, 1884 Miss. LEXIS 151 (Miss. 1884).

3. Debtor's discharge in bankruptcy.

Garnishee's effort to set up judgment debtor's discharge in bankruptcy held not answer to garnishment writ. *England Motor Co. v. Greenville Commercial Body Co.*, 163 Miss. 22, 138 So. 591, 1932 Miss. LEXIS 12 (Miss. 1932).

In garnishment proceeding, garnishee had no authority to set up judgment debtor's bankruptcy proceeding, such defense being personal to the debtor. *England Motor Co. v. Greenville Commercial Body Co.*, 163 Miss. 22, 138 So. 591, 1932 Miss. LEXIS 12 (Miss. 1932).

Where garnishee attempted to set up debtor's discharge in bankruptcy, and judgment was rendered against garnishee, court should have permitted garnishee at same term to file answer in accordance with facts. *England Motor Co. v. Greenville Commercial Body Co.*, 163 Miss. 22, 138 So. 591, 1932 Miss. LEXIS 12 (Miss. 1932).

4. Setoff.

The strict rule of law as to pleading setoff in an ordinary action does not apply where the garnishee pleads a setoff to the debt he owes a judgment debtor. *Melton Hardware Co. v. Heidelberg*, 91 Miss. 598, 44 So. 857, 1907 Miss. LEXIS 158 (Miss. 1907).

RESEARCH REFERENCES

ALR.

Garnishee's pleading, answering interrogatories, or the like, as affecting his right to assert court's lack of jurisdiction. 41 A.L.R.2d 1093.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 319 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 241 et seq.; Forms 271 et seq.

§ 11-35-27. Garnishee's answer; time.

Except as otherwise provided in Section 11-35-23, garnishees shall, in all cases in the circuit or chancery court, answer on the first day of the return term, and, in the courts of justices of the peace, they shall answer by noon on the return day of the writ, unless the court, for cause shown, shall grant further time; and, if upon the answer of any garnishee, it appear that there is any estate of the defendant in the hands of any person not summoned, an alias writ may at once be issued, to be levied on the property in the hands of such person, or he may be summoned as garnishee.

HISTORY: Codes, 1857, ch. 52, art. 26; 1871, § 1443; 1880, § 2444; 1892, § 2140; 1906, § 2347; Hemingway's 1917, § 1942; 1930, § 1848; 1942, § 2800; Laws, 2017, ch. 407, § 11, eff from and after July 1, 2017.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A default judgment entered against garnishee on return day of writ was irregular on its face, garnishee being entitled to entire return day in which to make his answer, and it should have been set aside upon application duly filed at any time before final adjournment of the term of court at which it was entered. *Rogers v. Ziller*, 48 So. 2d 476 (Miss. 1950).

Answer of garnishee must be filed in justice court within the time prescribed and on failure to do so cannot be filed in the circuit court on appeal. *Gulf & S. I. R. Co. v. Ramsey*, 98 Miss. 863, 54 So. 440, 1910 Miss. LEXIS 135 (Miss. 1910); *Southern Lumber & Mfg. Co. v. Mallett*,

101 Miss. 135, 57 So. 548, 1911 Miss. LEXIS 113 (Miss. 1911); *Jamison v. H. K. Mulford Co.*, 108 Miss. 639, 67 So. 148, 1914 Miss. LEXIS 251 (Miss. 1914).

The garnishee may answer at any time after service of the writ and need not wait until the beginning of the term. The plaintiff, if the answer be filed before the return day, may require an additional answer. *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74, 1883 Miss. LEXIS 75 (Miss. 1883).

Garnishees may answer before the term begins to which the writ is returnable. *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74, 1883 Miss. LEXIS 75 (Miss. 1883).

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attach-

ment And Garnishment, Forms 241 et seq.; Forms 271 et seq.

§ 11-35-29. Judgment on answer.

If the garnishee admits indebtedness to or the possession of effects of the defendant, and he have not paid or delivered the same to the sheriff, judgment may be rendered against him in favor of the plaintiff for the amount of the debt admitted, or for the property, or the value thereof (to be assessed if necessary), admitted to be in his possession; but the judgment shall not be for a greater sum than the plaintiff's demand.

HISTORY: Codes, 1892, § 2137; 1906, § 2344; Hemingway's 1917, § 1939; 1930, § 1845; 1942, § 2797.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The word “admit” was changed to “admits”. The Joint Committee ratified the correction at its December 3, 1996, meeting.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where an answer in a garnishment proceeding was filed which did not raise an issue of fact, and the plaintiff in garnishment did not contest the extent of the discovery or the truthfulness of the answer, judgment on the answer was properly entered. *State Farm Mut. Auto. Ins. Co. v. Sampson*, 324 So. 2d 739, 1975 Miss. LEXIS 1596 (Miss. 1975).

Where a fire insurance company, being garnished, filed a sworn certificate which is silent as to any indebtedness to defendant in attachment, but states that it had issued a policy to claimant of the property attached, which had burned, but that the policy had been avoided and nothing is due assured, this shows an attempt to comply with the summons, and it is error, without notice to the garnishee and opportunity to amend, to render judgment as for want of an answer. *Threefoot v. Whittle*, 71 Miss. 392, 15 So. 120 (Miss. 1893).

A judgment against a garnishee does not operate as a transfer to the garnishing creditor of the debt owing by the garnishee, nor until payment thereof is it a bar to a suit against the garnishee by the defendant, his creditor. *Yazoo & M. V. R. Co. v. Fulton*, 71 Miss. 385, 14 So. 271, 1893 Miss. LEXIS 166 (Miss. 1893).

A creditor may proceed to judgment against his debtor notwithstanding the latter has been garnished in respect to the debt sued for, but this being shown, the judgment should require execution to be stayed for the amount for which the defendant has been or is sought to be charged as garnishee. *Yazoo & M. V. R. Co. v. Fulton*, 71 Miss. 385, 14 So. 271, 1893 Miss. LEXIS 166 (Miss. 1893).

Where a judgment against a garnishee in attachment shows that the defendant in the suit consented to such judgment the garnishee cannot have it reversed on the grounds that there was no precedent judgment against the defendant. *Daniel v. Daniels & Co.*, 62 Miss. 352, 1884 Miss. LEXIS 80 (Miss. 1884).

Where a judgment recites that the garnishee admitted the indebtedness for which it was rendered, it is not error that the garnishee was not served with the writ and no answer by him appears on the record brought to the Supreme Court. *Daniel v. Daniels & Co.*, 62 Miss. 352, 1884 Miss. LEXIS 80 (Miss. 1884).

The judgment against the garnishee must not be larger than the judgment against the original defendant. *Hoffman v. Levi Simon & Co.*, 52 Miss. 302, 1876 Miss. LEXIS 214 (Miss. 1876).

§ 11-35-31. Garnishee's failure to answer.

If a garnishee, personally summoned, shall fail to answer as required by law, or if a scire facias on a judgment nisi be executed on him, and he fail to show cause for vacating it, the court shall enter a judgment against him for the amount of plaintiff's demand; and execution shall issue thereon, provided, however, that the garnishee may suspend the execution by filing a sworn declaration in said court showing the property and effects in his possession belonging to the debtor, and his indebtedness to the debtor, if any, or showing that there be none, if that be true; and by such act and upon a hearing thereon,

the garnishee shall limit his liability to the extent of such property and effects in his hands, and such indebtedness due by him to the debtor, plus court costs and reasonable attorney's fees of the judgment creditor in said garnishment action.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (19), ch. 62, art. 7 (2); 1857, ch. 52, art. 25; 1871, § 1442; 1880, § 2446; 1892, § 2138; 1906, § 2345; Hemingway's 1917, § 1940; 1930, § 1846; 1942, § 2798; Laws, 1966, ch. 364, § 1, eff from and after passage (approved May 20, 1966).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction and application.
3. Illustrative cases.

1. In general.

Where a sworn declaration is filed pursuant to § 11-35-31 prior to execution on the default judgment, a defaulting garnishee suffers only liability for attorney's fees and court costs and does not waive its ability to assert defenses on the merits. *Wayne Lee's Grocery & Market, Inc. v. Bay St. Louis, Mississippi Commercial Properties Dev. Corp.*, 580 So. 2d 1295, 1991 Miss. LEXIS 321 (Miss. 1991).

The penalty for failure to answer a writ of garnishment in a timely manner is bearing the expense of putting the creditor in the same position that it would have enjoyed had a timely answer been filed. In other words, the defaulting garnishee must pay over any amounts which would have been caught by the garnishment and pay costs and attorney's fees. *Wayne Lee's Grocery & Market, Inc. v. Bay St. Louis, Mississippi Commercial Properties Dev. Corp.*, 580 So. 2d 1295, 1991 Miss. LEXIS 321 (Miss. 1991).

Right of garnishee to vacate default judgment, allow answer to be filed and to obtain hearing to determine extent of property and effects in possession of garnishee is as provided in garnishment statute (§ 11-35-31); inconsistent provisions of Mississippi Rule of Procedure 60 are inapplicable. *Federal Sav. & Loan Ins. Corp. v. S. & W. Constr. Co.*, 475 So. 2d 145, 1985 Miss. LEXIS 2314 (Miss. 1985).

In a garnishment action by a judgment creditor, in an automobile accident case against the insurer of an automobile which had been driven by the uninsured judgment debtor, the court did not abuse its discretion in setting aside a default judgment against the insurer, where at the same term of court at which the default judgment was rendered, the insurer was able to show cause for vacating the default judgment, and the court did in fact vacate that judgment. *St. Paul Fire & Marine Ins. Co. v. Arnold*, 254 So. 2d 872, 1971 Miss. LEXIS 1522 (Miss. 1971).

A garnishee purporting to answer a writ of garnishment should disclose whether any indebtedness existed at the time of the service of writ or thereafter and whether there was any property in the hands of the garnishee and also that the answers must be made under oath. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442, 1955 Miss. LEXIS 547 (Miss. 1955).

Where garnishee on return day under scire facias after judgment nisi did not file answer, no issue was presented, warranting exclusion of evidence setting up defense. *Busby v. Merchants' & Mfrs' Bank*, 158 Miss. 843, 131 So. 645, 1931 Miss. LEXIS 1 (Miss. 1931).

When a person is summoned as garnishee and fails to appear and answer the writ, the law presumes that he admits the debt to be due equal to the amount of the demand and on this assumption permits a judgment to be taken against him. *Little v. Nelson*, 61 Miss. 672, 1884 Miss. LEXIS 151 (Miss. 1884).

2. Construction and application.

Response to a writ of garnishment,

claiming a party was not indebted at the time the writ issued, if properly asserted, would have unquestionably entitled the party to relief from the garnishment without the need for a Miss. R. Civ. P. 60(b) inquiry. *Bechtel Power Corp. v. MMC Materials, Inc.*, 830 So. 2d 672, 2002 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 830 So. 2d 1251, 2002 Miss. App. LEXIS 731 (Miss. Ct. App. 2002).

In order to suspend the execution of the writ of garnishment, a sworn declaration must be filed in the court before the garnishee has answered and paid into court the funds caught by the garnishment; one cannot wait to file a declaration to suspend the execution until the execution has been completed, the answer filed, the funds paid into court and disbursed by the clerk to the judgment creditor. *Triplett v. Brunt-Ward Chevrolet, Oldsmobile, Pontiac, Buick, Cadillac, GMC Trucks, Inc.*, 812 So. 2d 1061, 2001 Miss. App. LEXIS 135 (Miss. Ct. App. 2001).

A garnishee who failed to answer a writ of garnishment was liable only for attorney's fees and costs where the judgment debtor who was employed by the garnishee had no non-exempt disposable earnings which were not subject to prior garnishments. *Wayne Lee's Grocery & Market, Inc. v. Bay St. Louis, Mississippi Commercial Properties Dev. Corp.*, 580 So. 2d 1295, 1991 Miss. LEXIS 321 (Miss. 1991).

Garnishee properly answered writ of garnishment under Mississippi Code § 11-35-31 where garnishee's response invoked her marital privilege, even though response set forth none of information sought by creditor. *Fidelity Nat'l Bank v. Center Management, Inc.*, 585 F. Supp. 1406, 1984 U.S. Dist. LEXIS 15921 (S.D. Miss. 1984).

A garnishee, even though the subject of an otherwise valid default judgment following service of the writ of garnishment and failure to answer, may nevertheless, under § 11-35-31, suspend execution and enforcement of that judgment at any time before completion of the execution of the enforcement process thereon. *First Mississippi Nat'l Bank v. KLH Industries, Inc.*, 457 So. 2d 1333, 1984 Miss. LEXIS 1978 (Miss. 1984).

In order to suspend the execution of a writ of garnishment, the sworn declaration required by the statute must be filed in the court before the garnishee has answered and paid into court the funds caught by the garnishment. *Haley v. State*, 404 So. 2d 320, 1981 Miss. LEXIS 2409 (Miss. 1981).

A default judgment against a garnishee failing to answer may not be set aside at a term of court following that of its rendition because the garnishee made an attempt in good faith to answer by preparing one which through mistake was not forwarded to the clerk of the court. *George v. Standard Oil Co.*, 239 Miss. 712, 124 So. 2d 858, 1960 Miss. LEXIS 346 (Miss. 1960).

In a garnishment action where a letter was written to the court by the garnishee in which he stated that there was no indebtedness due judgment debtor, that fact should have been alleged in garnishee's answer to the writ of garnishment. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442, 1955 Miss. LEXIS 547 (Miss. 1955).

Where as to a writ of garnishment issued to nonresident express company doing business in the state, the garnishee had the right to raise legal question as to jurisdiction of the court and also the reasonableness of its refusal to answer certain questions, the action of the trial court in striking out the answer of the garnishee and rendering judgment against him without first ordering a hearing, and ordering the garnishee to answer the questions and then to give it ample time within which to do so, was reversible error. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29, 1951 Miss. LEXIS 422 (Miss. 1951).

Default judgment against garnishee will not be set aside for failure of garnishee's agent to file its answer to writ of garnishment. *Campbell v. Yazoo & M. V. R. Co.*, 199 Miss. 309, 24 So. 2d 531, 1946 Miss. LEXIS 199 (Miss. 1946).

Where garnishee attempted to set up debtor's discharge in bankruptcy, and judgment was rendered against garnishee, court should have permitted garnishee at same term to file answer in accordance with facts. *England Motor Co. v. Greenville Commercial Body Co.*, 163

Miss. 22, 138 So. 591, 1932 Miss. LEXIS 12 (Miss. 1932).

Judgment setting aside judgment in garnishment proceeding at subsequent term on undisposed of motion made during term at which judgment was rendered was not void, and clerk was improperly enjoined from setting aside judgment. *Meggett v. Greenville Commercial Body Co.*, 161 Miss. 370, 137 So. 187, 1931 Miss. LEXIS 273 (Miss. 1931).

Where railroad company, garnished on valid judgment against its employee, defaulted in answering by time fixed by law and judgment was rendered against it, which it paid, it could set off amount thereof against a debt to its employee where such money was not exempt from execution or garnishment. *Gulf, M. & N. R. Co. v. Sanders*, 143 Miss. 492, 108 So. 184, 1926 Miss. LEXIS 285 (Miss. 1926).

A judgment by default taken against a garnishee on the second day of the term of court to which it was returnable, should be set aside when it appears that the garnishee failed to answer because of a misleading statement of the debtor that the controversy had been settled. *Miller v. Port Gibson Brick Mfg. Co.*, 78 Miss. 170, 28 So. 807, 1900 Miss. LEXIS 83 (Miss. 1900).

Where an insurance company being garnished files its sworn certificate that it had issued a policy to a claimant on the property attached which had burned, but that the policy has been avoided and nothing is due the assured, which certificate is silent as to any indebtedness to the defendant in attachment, this shows an attempt to comply with the summons, and it is error, without notice to the garnishee and opportunity to amend, to render judgment as for want of an answer. *Threefoot v. Whittle*, 71 Miss. 392, 15 So. 120 (Miss. 1893).

3. Illustrative cases.

As the "earth movement" endorsement in a contractor's general commercial liability policy excluded from coverage the property damage a homeowner suffered, the insurer had no property in its possession belonging to the contractor; therefore the trial court properly set aside the homeowner's default judgment against the insurer pursuant to Miss. Code Ann. § 11-35-31 and granted the insurer summary judgment on the homeowner's action for a writ of garnishment. *Hankins v. Md. Cas. Company/Zurich Am. Ins. Co.*, 101 So. 3d 645, 2012 Miss. LEXIS 491 (Miss. 2012).

OPINIONS OF THE ATTORNEY GENERAL

If particular judgment debtor was not employed by garnishee and garnishee did not owe or have possession of that judgment debtor's property then there would

be no liability for garnishee that followed provisions of statute. *Gibson*, April 12, 1990, A.G. Op. #90-0220.

RESEARCH REFERENCES

ALR.

Validity of statute or rule providing for arbitration of fee disputes between attorneys and their clients. 17 A.L.R.4th 993.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

§ 11-35-33. Garnishee may claim exemptions.

Any garnishee who answers admitting an indebtedness, or the possession of property due or belonging to the defendant, may show by his answer that he is advised and believes that the defendant does or will claim the debt or property, or some part thereof, as exempt from garnishment, levy, or sale. Upon the filing of such answer, the clerk or justice of the peace shall issue a summons

or make publication, if defendant be shown by oath to be absent from the state, for the defendant, notifying him of the garnishment and the answer, and requiring him to assert his right to the exemption. Proceedings against the garnishee shall be stayed until the question of the debtor's right to the exemption be determined. If the defendant fail to appear, judgment by default may be taken against him, adjudging that he is not entitled to the property or debt as exempt; but if he appear, the court shall, on his motion, cause an issue to be made up and tried between him and the plaintiff.

HISTORY: Codes, 1892, § 2139; 1906, § 2346; Hemingway's 1917, § 1941; 1930, § 1847; 1942, § 2799.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Exemption of income or principal from an employee trust plan, see § 71-1-43.

Exempt property, see § 85-3-1 et seq.

Officer's bond of indemnity, see § 85-3-5.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Failure to suggest exemption.
3. Waiver of exemption.

1. In general.

The statute does not require the garnishee to suggest in its answer any possibility that funds are exempt as to a joint account holder to the account subject to garnishment; it only requires the garnishee to raise the question of an exemption as to the judgment debtor if there is a reasonable basis to think the judgment debtor intended to make such a claim. *Triplett v. Brunt-Ward Chevrolet, Oldsmobile, Pontiac, Buick, Cadillac, GMC Trucks, Inc.*, 812 So. 2d 1061, 2001 Miss. App. LEXIS 135 (Miss. Ct. App. 2001).

Where a judgment debtor is only entitled to notice of the garnishment action if the garnishee suggests exemptions under this section, the notice provisions of M.R.C.P. 55 are inconsistent with the statutes, and are not applicable. *Folse v. Stennett-Yancey*, 757 So. 2d 989, 2000 Miss. LEXIS 67 (Miss. 2000).

Where a judgment creditor failed to join issue raised in answers filed both by the judgment debtor and garnishee as to

whether the indebtedness owing by the garnishee to the judgment debtor was dischargeable in bankruptcy, chancery court was without jurisdiction to render final orders in the garnishment proceedings. *Hunter v. Commercial Sec. Co.*, 237 Miss. 41, 113 So. 2d 127, 1959 Miss. LEXIS 571 (Miss. 1959).

On suggestion of exemption, all proceedings should be stayed pending notice to judgment debtor and determination of that issue. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363, 1928 Miss. LEXIS 283 (Miss. 1928).

Failure to issue summons for garnishee after securing writ of certiorari within proper time, after claim of exemption had been allowed, and issuing summons only for judgment defendant, held not to bar proceedings as to garnishee, since petition and bond were filed and writ issued within statutory limits. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146, 1926 Miss. LEXIS 136 (Miss. 1926).

Judgment creditor, having issued certiorari within statutory limit after allowance of exemption on return to writ of garnishment, held not estopped to prosecute writ because garnishee had paid out money in its hands before filing petition.

Citizens' Bank v. Ratliff & Bradshaw, 142 Miss. 866, 108 So. 146, 1926 Miss. LEXIS 136 (Miss. 1926).

On suggestion of an exemption in the answer the court must summon the exemptioners. *Illinois C. R. Co. v. Badley*, 94 Miss. 437, 49 So. 114, 1909 Miss. LEXIS 366 (Miss. 1909).

As to the rule governing the exemption from garnishment of the wages of a laborer or other person who is the head of a family working for wages, see *Chapman v. Berry*, 73 Miss. 437, 18 So. 918, 1895 Miss. LEXIS 107 (Miss. 1895).

Exemption of the wages of a laborer under Mississippi law from a debt due in the state to a resident of the state cannot be defeated by a garnishment against a railroad, indebted to such laborer, in a foreign state where such railroad also has a line, and the court will give effect to the exemption laws, regardless of the laws of the foreign state. *Illinois C. R. Co. v. Smith*, 70 Miss. 344, 12 So. 461, 1892 Miss. LEXIS 129 (Miss. 1892), overruled in part, *Southern P. R. Co. v. A. J. Lyon & Co.*, 54 So. 784 (Miss. 1911), overruled, *Southern P. R. Co. v. A. J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, 1911 Miss. LEXIS 188 (Miss. 1911).

2. Failure to suggest exemption.

As distinguished from garnishee in chancery attachment, garnishee in law garnishment must answer whether it owes, or has in its possession effects of, nonresident defendant, and also must answer whether it knows or believes that any other person is indebted to, or has in his possession effects of such nonresident, and, if so, whom, in what amounts, and where he resides; and garnishee to protect himself, is also under duty to raise question of exemption of the debtor-defendant as well as the validity of the judgment on which the garnishment is based. *Mid*

South Paving Co. v. State Highway Com., 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

In action by employee against railroad company to recover wages, if exemption from garnishment is not pleaded or proven in record, Supreme Court on appeal cannot take cognizance thereof so as to defeat company's claim of right to set off amount which it had paid under garnishment in action against employee. *Gulf, M. & N. R. Co. v. Sanders*, 143 Miss. 492, 108 So. 184, 1926 Miss. LEXIS 285 (Miss. 1926).

On failure of garnishee to suggest the name of a claimant to the debt judgment only can be rendered against the garnishee. *Russell v. Allen*, 110 Miss. 722, 70 So. 890, 1916 Miss. LEXIS 198 (Miss. 1916); *Howell v. Moss Point Furniture Co.*, 136 Miss. 399, 101 So. 559, 1924 Miss. LEXIS 152 (Miss. 1924).

A garnishee who pays a judgment rendered against it as such and takes an assignment of the judgment on which the writ was issued, remains liable to the judgment debtor where the debt garnished was exempt as the monthly wages of the head of a family, and the garnishee has failed to suggest the claim of exemption. *City of Laurel v. Turner*, 80 Miss. 530, 31 So. 965, 1902 Miss. LEXIS 281 (Miss. 1902).

Exemptions are highly favored by the law and their protection may not be defeated by the intention or the neglect of the garnishee. *City of Laurel v. Turner*, 80 Miss. 530, 31 So. 965, 1902 Miss. LEXIS 281 (Miss. 1902).

3. Waiver of exemption.

Defendant in garnishment proceedings, voluntarily appearing and failing to submit claim of exemption, waived his right to do so. *Blaylock v. J. Rubel & Co.*, 119 So. 503, 1928 Miss. LEXIS 395 (Miss. 1928).

OPINIONS OF THE ATTORNEY GENERAL

If a garnishee suggests an exemption, the court should send notice to the judgment debtor for a hearing on the exemption; the judgment holder is responsible for prepayment of service of process costs

and process from justice court should be issued to a constable and paid as provided by Section 25-7-27. Shirley, Mar. 14, 2003, A.G. Op. #03-0114.

RESEARCH REFERENCES

ALR.

Admissibility of hearsay evidence as to comparable sales of other land as basis for

expert's opinion as to land value. 12 A.L.R.3d 1064.

§ 11-35-35. Stay if debt not yet due; delivery of goods or chattels to sheriff.

If a garnishee admit an indebtedness not then due, execution shall be stayed until its maturity; and if he admit the possession of goods or chattels of the defendant, such goods or chattels shall be delivered to the sheriff; but, in attachment cases, the garnishee may replevy the property by giving a bond for the same, as the defendant in attachment may do, and subject to the same proceedings and liabilities.

HISTORY: Codes, 1857, ch. 52, art. 27; 1871, § 1444; 1880, § 2445; 1892, § 2141; 1906, § 2348; Hemingway's 1917, § 1943; 1930, § 1849; 1942, § 2801.

Cross References — Attachment for a debt not due, see § 11-33-35. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If a garnishee answers admitting an indebtedness not due, execution will be stayed until maturity. If he denies the indebtedness and on a trial it is found that he owes a debt not then due, judgment will be stayed as if the fact had been confessed in the answer. *Red v. Powers*, 69 Miss. 242, 13 So. 586, 1891 Miss. LEXIS 133 (Miss. 1891).

Where judgment is taken upon an answer, which is not contested, admitting a debt not due, it should stay the execution; but if it fail to do so execution cannot be rightfully issued until the debt is due. *Anderson v. Wanzer*, 6 Miss. 587, 1841 Miss. LEXIS 41 (Miss. 1841).

§ 11-35-37. Garnishee protected in certain cases.

If a garnishee shall pay over or deliver, in pursuance of the judgment or process of the court, any money or property belonging to the defendant, before notice of sale, assignment, or transfer thereof by the defendant to any other person, such garnishee shall not thereafter be liable for the debt or property to the vendee or assignee thereof.

HISTORY: Codes, Hutchinson's 1848, ch. 62, art. 7 (5); 1857, ch. 52, art. 36; 1871, § 1453; 1880, § 2447; 1892, § 2142; 1906, § 2349; Hemingway's 1917, § 1944; 1930, § 1850; 1942, § 2802.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The mere pendency of a garnishment against the payee in a note does not exempt him from liability in an action on the

note. *Brahan v. First Nat'l Bank*, 72 Miss. 266, 16 So. 203, 1894 Miss. LEXIS 63 (Miss. 1894).

§ 11-35-39. Garnishee may plead that judgment is void.

The garnishee may plead that the judgment under which the writ of garnishment was issued is void, and if his plea be sustained, no judgment shall be rendered against him.

HISTORY: Codes, 1906, § 2350; Hemingway's 1917, § 1945; 1930, § 1851; 1942, § 2803.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where at the hearing on a writ of garnishment issued against an automobile liability insurer the claimed policy of insurance was not introduced in evidence or made a part of the record, it would be impossible to determine whether it covered either the driver or the automobile allegedly responsible for the collision or the damage resulting therefrom, and for this reason it was error to grant judgment on the garnishment writ. *State Farm Mut. Auto. Ins. Co. v. Stewart*, 209 So. 2d 438, 1968 Miss. LEXIS 1448 (Miss. 1968).

Reversal of the main judgment annuls a judgment against a garnishee. *Grain Dealers Mut. Ins. Co. v. Langlinais*, 240 Miss. 258, 126 So. 2d 869, 1961 Miss. LEXIS 457 (Miss. 1961).

As distinguished from garnishee in chancery attachment, garnishee in a law garnishment must answer whether it owes, or has in its possession effects of, nonresident defendant, and also must answer whether it knows or believes that any other person is indebted to, or has in his possession effect of such nonresident, and, if so, whom, in what amounts, and where he resides; and garnishee, to protect himself, is also under duty to raise question of exemption of the debtor-defendant as well as the validity of the judgment on which the garnishment is based. *Mid South Paving Co. v. State Highway*

Com., 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Notation on declaration whereby defendant's attorney waived process and entered appearance during term, without attestation by clerk of court, held not to authorize default judgment, and therefore such judgment furnished no basis for recovery from garnishee. *Industrial Inv. Co. v. Standard Life Ins. Co.*, 170 Miss. 138, 149 So. 883, 1933 Miss. LEXIS 11 (Miss. 1933).

A judgment by default against a garnishee cannot be sustained where the original judgment was void and will be reversed on appeal. *Copiah Hardware Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375, 1924 Miss. LEXIS 127 (Miss. 1924).

The validity of judgment against a garnishee is dependent upon the validity of the judgment in the main action. *Moody & Williams v. Dye*, 125 Miss. 770, 88 So. 332, 1921 Miss. LEXIS 165 (Miss. 1921).

To attack a judgment against a garnishee the fact that the judgment is void should be specially pleaded. *Russell v. Allen*, 110 Miss. 722, 70 So. 890, 1916 Miss. LEXIS 198 (Miss. 1916).

Entrance of irregular return on writ which does not render it void. *Reeves Grocery Co. v. Thompson*, 105 Miss. 729, 63 So. 187, 1913 Miss. LEXIS 244 (Miss. 1913).

A garnishment upon a judgment against the “Southern Insurance Company of New Orleans” is not void and the garnishee cannot escape liability because the record does not show whether the

defendant in the judgment is a corporation, natural person, or a partnership. *Winner v. McMullan*, 77 Miss. 662, 27 So. 618 (Miss. 1900).

§ 11-35-41. Garnishee may compel interpleader.

When a garnishee, by his answer or by affidavit at any time before final judgment against him, or after such judgment if he had no such notice before the judgment was rendered, shall show that he has been notified that another person claims title to or an interest in the debt or property, which has been admitted by him, or found on a trial to be due or to be in his possession, the court shall suspend all further proceedings, and cause a summons to issue or publication to be made for the person so claiming to appear and contest with the plaintiff the right to such money, debt, or property. In such case, if the answer admit an indebtedness, and the garnishee pay the money into court, he shall thereupon be discharged from liability to either party for the sum so paid. And whenever such garnishee shall by said answer or affidavit show that he has been notified that another person claims title to or interest in such debt or property, it shall be lawful for such third person of his own motion to come in and claim the debt or property, and the claim shall be tried as other claimant’s issues are tried whether summons or publication has been made to bring him in or not.

HISTORY: Codes, 1857, ch. 52, art. 34; 1871, § 1451; 1880, § 2449; 1892, § 2143; 1906, § 2351; Hemingway’s 1917, § 1946; 1930, § 1852; 1942, § 2804.

Cross References — Interpleader proceedings, see Miss. R. Civ. P. 22. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Right of interpleader.
3. —After judgment.
4. Duties and liabilities of garnishee.
5. —Payment into court.
6. Procedure.

1. In general.

Charging lien, protecting the attorney’s right to the fruits of his labor, and the right to interplead, protecting the garnishee from double liability, should not intersect with each other in such a way that frustrates one or the other right. *Bar-Til, Inc. v. Superior Asphalt, Inc.*, 219 So. 3d 553, 2017 Miss. App. LEXIS 261 (Miss. Ct. App. 2017).

Chancery court erred in granting each party involved a portion of the money rather than determining the order of descending priority because the attorney’s charging lien attached and had priority over the third-party garnishors; the monies satisfying the final judgment were interpled as the direct result of the law firm’s services, and the judgment was declared satisfied in full. *Bar-Til, Inc. v. Superior Asphalt, Inc.*, 219 So. 3d 553, 2017 Miss. App. LEXIS 261 (Miss. Ct. App. 2017).

A federal interpleader action brought in its own jurisdiction by a nonresident judgment debtor of an insolvent Mississippi judgment creditor was dismissed where, under Code 1942, §§ 1362 and 2804, ample procedures existed for the protec-

tion of the judgment debtor's rights in Mississippi. *Hansen v. Mathews*, 424 F.2d 1205, 1970 U.S. App. LEXIS 10987 (7th Cir. Wis.), cert. denied, 397 U.S. 1057, 90 S. Ct. 1404, 25 L. Ed. 2d 675, 1970 U.S. LEXIS 2256 (U.S. 1970).

One to whom accounts have been assigned as security may, upon recovering judgment against assignor, garnish account-debtors. *Ralston Purina Co. v. Como Feed & Milling Co.*, 325 F.2d 844, 1963 U.S. App. LEXIS 3722 (5th Cir. Miss. 1963).

Persons owing accounts which have been assigned by the creditor to another as security for an indebtedness may be garnished by the assignee on recovering a judgment against the assignor. *Ralston Purina Co. v. Como Feed & Milling Co.*, 325 F.2d 844, 1963 U.S. App. LEXIS 3722 (5th Cir. Miss. 1963).

Where the assignment of accounts receivable as collateral security was less than absolute and the assignor retained certain interests, the assignment was not a valid defense in garnishment proceedings brought by the assignee against the assigned account debtors after it had obtained a judgment against the assignor, for the garnishees would be fully protected from double liability under this section [Code 1942, § 2804]. *Ralston Purina Co. v. Como Feed & Milling Co.*, 325 F.2d 844, 1963 U.S. App. LEXIS 3722 (5th Cir. Miss. 1963).

In view of the protection afforded by this section [Code 1942, § 2804] to the rights of a joint owner, a debt due to several persons jointly, but not as partners, may be garnished by the creditors of one of them. *Fewell v. American Surety Co.*, 80 Miss. 782, 28 So. 755, 1902 Miss. LEXIS 213 (Miss. 1902).

A case where a garnishee impleaded assignee of judgment against it, although it had no notice of the assignment at the time writ of garnishment was served. *Schofield v. Hirsh*, 71 Miss. 55, 14 So. 528, 1893 Miss. LEXIS 190 (Miss. 1893).

The statutory mode of procedure is a substitute for the remedy by interpleader in equity. *Kellogg v. Freeman*, 50 Miss. 127, 1874 Miss. LEXIS 32 (Miss. 1874).

2. Right of interpleader.

Where in attachment it is suggested that a party has property of defendant,

and such party answers he has no control over the property and does not know whether it belongs to defendant, but that it is in a building he leased defendant, whereupon an order is made that such party surrender property to the sheriff, this is not a garnishment, and does bar the rightful owner of the right to assert title because of the failure of the party sought to be garnished to compel interpleader. *Minshew v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315, 1905 Miss. LEXIS 29 (Miss. 1905).

In absence of allegation by garnishee of notification of third person's claim, a third person, of his own motion, has no right to come in and claim the money, debt or property. *Porter v. West*, 64 Miss. 548, 8 So. 207, 1886 Miss. LEXIS 107 (Miss. 1886).

The maker of a note cannot maintain a bill of interpleader against an indorsee and an attaching creditor of the payee after the former has obtained judgment by suit, and the latter by garnishment against him. *McKinney v. Kuhn*, 59 Miss. 186, 1881 Miss. LEXIS 98 (Miss. 1881).

On the answer of a bank as garnishee denying indebtedness to the defendant, the defendant's transfer by check of a deposit to a third person may be attacked as fraudulent and its validity determined in a court of law, although such third person be summoned not at the suggestion of the garnishee, but of the plaintiff. *Kellogg v. Freeman*, 50 Miss. 127, 1874 Miss. LEXIS 32 (Miss. 1874); *People's Bank of Biloxi v. Smith*, 75 Miss. 753, 23 So. 428, 1898 Miss. LEXIS 21 (Miss. 1898).

3. —After judgment.

Provision for invocation of interpleader after final judgment means that the right of interpleader will exist where notice of the adverse claim by a third person has only been received by the garnishee after final judgment, but not as applying where such knowledge existed before judgment and was voluntarily withheld; in the latter case, it is too late to demand an interpleader after judgment. *Dodds v. Gregory, Stagg & Co.*, 61 Miss. 351, 1883 Miss. LEXIS 135 (Miss. 1883).

4. Duties and liabilities of garnishee.

Where a husband and wife sold land for

cash and purchase money notes, which the husband assigned to the wife, and a judgment creditor of the husband garnished the purchaser, it was the duty of the garnishee, the wife being a co-payee on the notes, to suggest the wife's ownership and thereby place the law court in a position to implead the wife and the judgment creditor, and where the garnishee failed to do this, the court could do nothing but render judgment against the garnishee in favor of the judgment creditor. *Russell v. Allen*, 110 Miss. 722, 70 So. 890, 1916 Miss. LEXIS 198 (Miss. 1916).

Where a garnishee, after answer, learns of an assignment of his debt, he must amend his answer or interplead the assignee, otherwise he subjects himself to a double payment of the debt. *Lewis v. Dunlop*, 57 Miss. 130, 1879 Miss. LEXIS 29 (Miss. 1879); *Dodds v. Gregory, Stagg & Co.*, 61 Miss. 351, 1883 Miss. LEXIS 135 (Miss. 1883).

Where the garnishee is indebted to the defendant as guardian and so answers, and his answer is controverted, and the plaintiff insists that the debt is due to the defendant individually, the garnishee should interplead the guardian or ward, if of age. If he fail to do so and judgment go against him equity will not aid him when proceeded against by the ward. *Horton v. Grant*, 56 Miss. 404, 1879 Miss. LEXIS 137 (Miss. 1879).

Where judgment has not been rendered

against the garnishee, the statute provides his remedy. A plea that he has been garnished is not a bar to a suit by a third party; he should be made a claimant under this statute. *Morin v. Bailey*, 55 Miss. 570, 1878 Miss. LEXIS 11 (Miss. 1878).

5. —Payment into court.

Where a railroad company contracted with one to build its roadbed and the contractor sublet a part of the work, and the employees of the subcontractor garnished the railroad company, and the railroad company answered stating the facts and paid the money due the contractor into court, its defense was complete and the company fully acquitted. *Herrin v. Warren & Mobley*, 61 Miss. 509, 1894 Miss. LEXIS 60 (Miss. 1894).

6. Procedure.

Where garnishees answered admitting indebtedness but claimed that indebtedness was subject to certain attachments, the answer was too vague and indefinite to raise an issue. *Mechanics' & Traders' Ins. Co. v. Butler*, 115 Miss. 476, 76 So. 521, 1917 Miss. LEXIS 221 (Miss. 1917).

Under Code 1892, § 2143, an issue made up orally was proper, no objection being made, although under Code 1892, § 2144 it could have been required that the claim be propounded under oath. *First Nat'l Bank v. Fain Grocery Co.*, 87 Miss. 503, 40 So. 6, 1905 Miss. LEXIS 164 (Miss. 1905).

§ 11-35-43. Claim of third person tried.

If the claimant, being duly summoned, fail to appear, the court shall adjudge the money, debt, or property to the plaintiff. If he appear, he shall propound his claim to the money, debt, or property in writing under oath; and the plaintiff may take issue thereon, and the same shall be tried and determined as other issues. If the issue be found in favor of the plaintiff, judgment shall be rendered for him against the garnishee, and also for the costs of the interpleader against the claimant; but if the issue be found for the claimant, judgment shall be rendered in his favor against the garnishee, and against the plaintiff for the costs. Where the garnishee has paid money into court, the judgment shall direct its payment to the party entitled thereto, and a judgment therefor shall not go against the garnishee.

HISTORY: Codes, 1857, ch. 52, art. 35; 1871, § 1452; 1880, § 2450; 1892, § 2144; 1906, § 2352; Hemingway's 1917, § 1947; 1930, § 1853; 1942, § 2805.

Cross References — Trial of right of property, see § 11-23-1 et seq.
 Interpleader proceedings, see Miss. R. Civ. P. 22.
 Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Trial court may allow judgment creditor to join issue on third party claim after expiration of term to which garnishment was returnable and at which claim was filed. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749, 1934 Miss. LEXIS 353 (Miss. 1934).

Trial court's decision allowing judgment creditor to join issue on third party claim after term to which garnishment is returnable is reviewable only in case of

abuse of discretion. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749, 1934 Miss. LEXIS 353 (Miss. 1934).

Under Code 1892, § 2143, an issue made up orally was proper, no objection being made, although under Code 1892, § 2144 it could have been required that the claim be propounded under oath. *First Nat'l Bank v. Fain Grocery Co.*, 87 Miss. 503, 40 So. 6, 1905 Miss. LEXIS 164 (Miss. 1905).

RESEARCH REFERENCES

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment §§ 506 et seq.

§ 11-35-45. Contest of garnishee's answer by plaintiff.

If the plaintiff believe that the answer of the garnishee is untrue, or that it is not a full discovery as to the debt due by the garnishee, or as to the property in his possession belonging to the defendant, he shall, at the term when the answer is filed, unless the court grant further time, contest the same, in writing, specifying in what particular he believes the answer to be incorrect. Thereupon, the court shall try the issue at once, unless cause be shown for a continuance, as to the truth of the answer, and shall render judgment upon the facts found, when in plaintiff's favor, as if they had been admitted by the answer, but if the answer be found correct, the garnishee shall have judgment for costs against the plaintiff.

HISTORY: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (21), ch. 62, art. 7 (4); 1857, ch. 52, art. 28; 1871, § 1445; 1880, § 2451; 1892, § 2145; 1906, § 2353; *Hemingway's* 1917, § 1948; 1930, § 1854; 1942, § 2806.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Time for contest.
3. Trial of issue.
4. —Evidence.

5. —Burden of proof.
6. Judgment.

1. In general.

Under the section, the garnishor must file a written contest to the garnishee's

answer in order to frame the issue to be tried. *State Farm Mut. Auto Ins. Co. v. Eakins*, 707 So. 2d 1100, 1997 Miss. App. LEXIS 817 (Miss. Ct. App. 1997), rev'd, 1998 Miss. LEXIS 593 (Miss. Dec. 10, 1998).

Where a judgment creditor failed to join issue raised in answers filed both by the judgment debtor and garnishee as to whether the indebtedness owing by the garnishee to the judgment debtor was dischargeable in bankruptcy, chancery court was without jurisdiction to render final orders in the garnishment proceedings. *Hunter v. Commercial Sec. Co.*, 237 Miss. 41, 113 So. 2d 127, 1959 Miss. LEXIS 571 (Miss. 1959).

The garnishee's answer is conclusive until contested as provided by law. *Williams v. Jones*, 42 Miss. 270, 1868 Miss. LEXIS 60 (Miss. 1868); *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474, 1932 Miss. LEXIS 212 (Miss. 1932).

2. Time for contest.

Response to a writ of garnishment, claiming a party was not indebted at the time the writ issued, if properly asserted, would have unquestionably entitled the party to relief from the garnishment without the need for a Miss. R. Civ. P. 60(b) inquiry, and the proper remedy was to remand the case to allow the party a reasonable opportunity in the trial court to contest the denial of indebtedness. *Bechtel Power Corp. v. MMC Materials, Inc.*, 830 So. 2d 672, 2002 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 830 So. 2d 1251, 2002 Miss. App. LEXIS 731 (Miss. Ct. App. 2002).

The answer of the garnishee must be contested at the return term or leave then granted by the court to contest it at a subsequent term. *Hattiesburg Trust & Banking Co. v. Hood*, 97 Miss. 340, 52 So. 790, 1910 Miss. LEXIS 274 (Miss. 1910); *Mechanics' & Traders' Ins. Co. v. Butler*, 115 Miss. 476, 76 So. 521, 1917 Miss. LEXIS 221 (Miss. 1917).

On certiorari to circuit court an answer of a garnishee in the justice court cannot be contested unless the answer clearly admits liability. *Hattiesburg Trust & Banking Co. v. Hood*, 97 Miss. 340, 52 So. 790, 1910 Miss. LEXIS 274 (Miss. 1910).

This section [Code 1942, § 2806] is imperative in requiring that a plaintiff wishing to contest the answer of a garnishee shall file his traverse at the term to which the answer is filed. Application made at a subsequent term for leave to file such traverse should be denied. *Consumers' Ice Co. v. Cook Well Co.*, 71 Miss. 886, 16 So. 259, 1894 Miss. LEXIS 29 (Miss. 1894).

3. Trial of issue.

The issue cannot be submitted to a jury at the same time with the issue between plaintiff and defendant in attachment. *Roberts v. Barry*, 42 Miss. 260, 1868 Miss. LEXIS 57 (Miss. 1868).

4. —Evidence.

Where the answer is contested, it is not itself evidence. *Lasley v. Sisloff*, 8 Miss. 157, 1843 Miss. LEXIS 70 (Miss. 1843).

On such an issue it is not necessary to produce the original judgment in evidence. *Lasley v. Sisloff*, 8 Miss. 157, 1843 Miss. LEXIS 70 (Miss. 1843).

5. —Burden of proof.

In a post-judgment garnishment action in which in which the garnishee sought to recover against a motor vehicle insurance company on a judgment obtained in a motor vehicle personal injury action, there was a presumption that the person driving the insured motor vehicle did so with the permission of the insured owner. *State Farm Mut. Auto Ins. Co. v. Eakins*, 707 So. 2d 1100, 1997 Miss. App. LEXIS 817 (Miss. Ct. App. 1997), rev'd, 1998 Miss. LEXIS 593 (Miss. Dec. 10, 1998).

Judgment creditor in automobile negligent suit has burden of proving compliance with conditions precedent to recovery under judgment debtor's automobile liability insurance policy in garnishment action against debtor's automobile liability carrier. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323, 1985 Miss. LEXIS 2184 (Miss. 1985).

Judgment creditor in automobile negligence suit satisfies burden of proving notice of suit, as condition precedent to recovery under judgment debtor's automobile liability insurance policy, in garnishment action against judgment debtor's automobile liability carrier by

evidence showing actual knowledge on part of carrier and its agents of both accident and existence of lawsuit sufficient to enable carrier to take necessary steps to protect itself from legal liability. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323, 1985 Miss. LEXIS 2184 (Miss. 1985).

Judgment creditor has burden of proof to show answer was untrue. *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474, 1932 Miss. LEXIS 212 (Miss. 1932).

The burden of proof in such an issue is on the plaintiff, and if it appear that the defendant had assigned the note due by the garnishee the transfer will be presumed to have been bona fide. *Thomas v. Sturges*, 32 Miss. 261, 1856 Miss. LEXIS 193 (Miss. 1856).

6. Judgment.

Judgment on pleadings for judgment creditor on traverse of garnishees' answer

held unauthorized, in absence of proof to support contest, though garnishees failed to appear. *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474, 1932 Miss. LEXIS 212 (Miss. 1932).

Where court erroneously rendered judgment on pleadings for judgment creditor traversing garnishees' answer, cause should be remanded to give opportunity to offer proof. *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474, 1932 Miss. LEXIS 212 (Miss. 1932).

One who accepted devise conditioned upon payment of an annuity to another was subject to garnishment for the debts of such other person, and where issue joined upon traverse of the answer was found against him, judgment was properly rendered against him "as if the facts found had been confessed by the garnishee in his answer." *Red v. Powers*, 69 Miss. 242, 13 So. 586, 1891 Miss. LEXIS 133 (Miss. 1891).

RESEARCH REFERENCES

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 291 et seq.

§ 11-35-47. Contest of garnishee's answer by defendant.

The defendant may contest, in writing, the answer of the garnishee, and may allege that the garnishee is indebted to him in a larger sum than he has admitted, or that he holds property of his not admitted by the answer, and shall specify in what particular the answer is untrue or defective. Thereupon an issue shall be made up and tried; but the plaintiff may take judgment for the sum admitted by the garnishee, or for the condemnation of the property admitted to be in his hands, notwithstanding the contest.

HISTORY: Codes, 1857, ch. 52, art. 32; 1871, § 1449; 1880, § 2452; 1892, § 2146; 1906, § 2354; *Hemingway's* 1917, § 1949; 1930, § 1855; 1942, § 2807.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Circuit court had authority to add a former husband to the garnishment proceeding between his former wife and his employer because the husband possessed

a sufficient interest to be joined; the husband's personal property was under the employer's control, and he asserted that the wife obtained title and possession to that property through fraudulent misrep-

resentation. *Cooper v. Estate of Gatwood*, 119 So. 3d 1031, 2013 Miss. LEXIS 412 (Miss. 2013).

In a garnishment proceeding against an insurer brought by the judgment creditor

of the insured, the insured was not an indispensable party. *Moore v. Sentry Ins. Co.*, 399 F. Supp. 929, 1975 U.S. Dist. LEXIS 16141 (S.D. Miss. 1975).

§ 11-35-49. Transfer to other county; change of venue.

Writs of garnishment, in all cases, may be issued to any county; but if the garnishee whose answer is contested, shall not be a resident of the county, then, upon an issue being made upon his answer, the venue of the trial of the issue may be changed, on his application, to the county of his residence. The court in which the issue is tried shall cause the facts found to be certified and returned with the issue to the court from which the writ issued, and judgment shall be entered thereupon as if the issue had there been tried.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 4 (27), art. 13 (4); 1857, ch. 52, art. 29; 1871, § 1446; 1880, § 2453; 1892, § 2147; 1906, § 2355; Hemingway's 1917, § 1950; 1930, § 1856; 1942, § 2808.

Cross References — Change of venue, generally, see §§ 11-11-51 through 11-11-59. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A defendant in garnishment proceedings cannot object to the venue because of the garnishee's residence in another county, and an order of transfer made on defendant's application is void. *McCloud v. McCullers*, 84 Miss. 20, 36 So. 65, 1904 Miss. LEXIS 3 (Miss. 1904).

A defendant in attachment cannot avail of the right to a change of venue given by this section [Code 1942, § 2808] to garnishees who reside out of the county and whose answers are controverted. *McCloud v. McCullers*, 84 Miss. 20, 36 So. 65, 1904 Miss. LEXIS 3 (Miss. 1904).

§ 11-35-51. Judgment on issue against garnishee.

If the issue in any case be found against the garnishee, judgment shall be rendered against him for the amount of the debt or money or property in his hands, which judgment shall be in favor of the plaintiff, if necessary to satisfy his judgment or claim against the defendant, or in favor of the defendant, if the judgment of the plaintiff have been satisfied, or for so much thereof as may remain after satisfying said judgment.

HISTORY: Codes, 1857, ch. 52, art. 33; 1871, § 1450; 1880, § 2454; 1892, § 2148; 1906, § 2356; Hemingway's 1917, § 1951; 1930, § 1857; 1942, § 2809.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-53. Valuation and discharge of judgment.

If the personal property levied on under an attachment, or any part thereof, shall have been left in the hands of the garnishee on his giving bond

as prescribed, the court or jury trying the issue between the plaintiff and garnishee, if it find for the plaintiff, shall assess the value of the property left in the hands of the garnishee. If the value of the property equal or exceed the amount due the plaintiff, judgment shall be entered against the garnishee and his sureties on his replevin bond for the sum due the plaintiff. If the value of the property be less than the amount due the plaintiff, judgment shall be entered against the garnishee and his sureties for the value of the property so replevied or left in his hands. If judgment by default shall be rendered against the garnishee, the value of the property so replevied or left in his hands shall be assessed, and judgment shall be entered as above provided. In all cases the judgment against the garnishee and his sureties shall be satisfied and discharged by the delivery to the sheriff of the property replevied or left in his hands within ten days after execution on the judgment shall have come to the hands of the sheriff, and he shall sell the property so delivered to him, and apply the proceeds to the payment of the execution.

HISTORY: Codes, 1857, ch. 52, art. 9; 1871, § 1448; 1880, § 2455; 1892, § 2149; 1906, § 2357; Hemingway's 1917, § 1952; 1930, § 1858; 1942, § 2810.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

But in case of a reversal for want of such finding of value the judgment will stand and a writ of inquiry only be awarded. *Atkinson v. Foxworth*, 53 Miss. 733, 1876 Miss. LEXIS 142 (Miss. 1876).

The only remedy for an insufficient replevy bond is against the officer taking the same. *Atkinson v. Foxworth*, 53 Miss. 733, 1876 Miss. LEXIS 142 (Miss. 1876).

And the value of each separate item thereof must be found. *Thomason v. Wadlington*, 53 Miss. 560, 1876 Miss. LEXIS 115 (Miss. 1876).

The jury must assess the value of the property. *Bedon v. Alexander*, 47 Miss. 254, 1872 Miss. LEXIS 70 (Miss. 1872).

§ 11-35-55. No final judgment in certain cases.

Final judgment upon a garnishment shall not go against a surety or accommodation indorser until judgment be rendered against the principal and the cosureties or prior indorsers who may be liable to judgment, if they be residents of the state.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 13 (1); 1857, ch. 52, art. 30; 1871, § 1447; 1880, § 2456; 1892, § 2150; 1906, § 2358; Hemingway's 1917, § 1953; 1930, § 1859; 1942, § 2811.

Cross References — Contract of accommodation party to negotiable instrument, see § 75-3-415.

Suits on indorsed bills and notes, see § 75-13-3.

Law of principal and surety, see § 87-5-1.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A judgment is not erroneous as a violation of this statute unless it appear affirmatively that the principal debtor or other

party liable is a resident of this state. *Thrasher v. John Buckingham & Co.*, 40 Miss. 67, 1866 Miss. LEXIS 51 (Miss. 1866).

§ 11-35-57. Executors and administrators may be garnished.

Executors and administrators may be garnished for a debt due by their testator or intestate to the defendant; but judgment shall not be entered in such case against an executor or administrator until the lapse of six months after the grant of letters; and they may be garnished as having effects due to legatees or distributees; but judgment shall not be rendered against them in such case, except with their consent, until after a final settlement of the estate.

HISTORY: Codes, 1857, ch. 52, art. 24; 1871, § 1485; 1880, § 2457; 1892, § 2151; 1906, § 2359; Hemingway's 1917, § 1954; 1930, § 1860; 1942, § 2812.

Cross References — What actions survive against an executor, see § 91-7-235. Executor or administrator not to be sued for six months, see § 91-7-239. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Decree in attachment for alimony against executors, as trustees, of estate which was finally settled with all debts paid except for ten-year trust estate provided by will, which did not interfere with trust although fixing a lien on real estate attached, and awarded wife and child amount of annuity due husband from estate, held proper, notwithstanding statutory provision that judgment should not be rendered against executors before final

settlement without their consent, since there was an actual if not formal settlement, and purpose of statute was to hold estate free from process against heirs until debts of estate were paid. *Kearney v. Kearney*, 178 Miss. 766, 174 So. 59, 1937 Miss. LEXIS 246 (Miss. 1937).

In a suit against an executor a debtor of the testator may be garnished. *Thrasher v. John Buckingham & Co.*, 40 Miss. 67, 1866 Miss. LEXIS 51 (Miss. 1866).

RESEARCH REFERENCES

ALR.

Garnishment against executor or ad-

ministrator by creditor of estate. 60 A.L.R.3d 1301.

§ 11-35-59. Proceedings if garnishee dies.

If the garnishee dies, like proceedings may be had as provided for in case of the death of a party to an action.

HISTORY: Codes, 1880, § 2458; 1892, § 2152; 1906, § 2360; Hemingway's 1917, § 1955; 1930, § 1861; 1942, § 2813.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation cor-

rected a typographical error in this section. The word “die” was changed to “dies”. The Joint Committee ratified the correction at its December 3, 1996, meeting.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-61. Garnishee compensation; conditions.

The garnishee shall be allowed for his attendance, out of the debts or effects in his possession, or against the plaintiff in attachment, judgment, or decree in case there be no debts or effects in his possession, provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and, in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing and to be obtained in the same way.

HISTORY: Codes, Hutchinson’s 1848, ch. 62, art. 7 (6); 1857, ch. 52, art. 37; 1871, § 1454; 1880, § 2448; 1892, § 2153; 1906, § 2361; Hemingway’s 1917, § 1956; 1930, § 1862; 1942, § 2814.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A garnishee may be allowed compensation for filing his answer together with pay and mileage as a juror, but the court cannot allow him an attorney’s fee for defending his answer. *Carruthers-Jones Shoe Co. v. Chickasaw County Bank*, 112 Miss. 315, 73 So. 49, 1916 Miss. LEXIS 110 (Miss. 1916).

A garnishee entitled to costs under this section [Code 1942, § 2814] should be allowed payment of same out of the fund in his hands, although a third person interpleads and establishes his right to such fund. The garnishing plaintiff is ultimately liable for all costs in such case, but it is error to refuse the garnishee his

allowance out of the fund and tax the same against the plaintiff, thereby imposing risk upon the garnishee in collecting costs out of the plaintiff. *Clark v. Gresham*, 67 Miss. 203, 7 So. 223, 1889 Miss. LEXIS 47 (Miss. 1889).

The statute which authorizes the court, in exceptional cases, to allow the garnishee reasonable compensation in addition to per diem and mileage, does not warrant the allowance to him of his attorney’s fee in a controversy between the plaintiff and garnishee, the good faith of the transaction between the defendant and the garnishee being the subject of the issue. *Senior v. Brogan*, 66 Miss. 178, 6 So. 649, 1888 Miss. LEXIS 84 (Miss. 1888).

CHAPTER 37.

REPLEVIN

Sec.

11-37-1 through 11-37-57. Repealed.

- 11-37-101. How replevin commenced; immediate seizure of property sought.
- 11-37-103. Judge may determine value of bond.
- 11-37-105. Form of plaintiff's replevin bond.
- 11-37-107. Venue.
- 11-37-109. The writ.
- 11-37-111. Form of the writ.
- 11-37-113. How writ may be executed.
- 11-37-115. Property restored to defendant on bond.
- 11-37-117. Form of return of officer.
- 11-37-119. New bond may be required of plaintiff.
- 11-37-121. When property not taken, plaintiff may elect to recover damages.
- 11-37-123. Duplicate, alias, and pluries writs or process, and publication.
- 11-37-125. Trial of replevin actions.
- 11-37-127. Judgment for plaintiff.
- 11-37-129. Judgment for defendant; default; writ of inquiry.
- 11-37-131. How replevin commenced—immediate seizure of property not sought.
- 11-37-133. Form of summons.
- 11-37-135. How summons shall be executed.
- 11-37-137. Contempt of defendant for concealing or disposing of property.
- 11-37-139. Resettlement of action for trial on a future date.
- 11-37-141. Judgment for plaintiff where property not previously seized.
- 11-37-143. Judgment for defendant where property not previously seized.
- 11-37-145. Replevin actions to be treated as preference cases.
- 11-37-147. Jury trial.
- 11-37-149. Claim of property by third person.
- 11-37-151. Claim of property by third person—issue, trial and judgment.
- 11-37-153. Laws applicable in case of death.
- 11-37-155. Replevin not maintainable in certain cases.
- 11-37-157. Replevin cumulative and additional to all other actions.

§§ 11-37-1 through 11-37-57. Repealed.

Repealed by Laws of 1975, ch. 508, § 30, eff from and after July 1, 1975.

§ 11-37-1. [Codes, Hutchinson's 1848, ch. 56, art. 11(2); 1857, ch. 56, art. 2; 1871, § 1529; 1880, § 2613; 1892, § 3707; 1906, § 4214; Hemingway's 1917, § 3043; 1930, § 3079; 1942, § 2841]

§ 11-37-3. [Codes, 1880, § 2635; 1892, § 3708; 1906, § 4215; Hemingway's 1917, § 3004; 1930, § 3080; 1942, § 2842]

§ 11-37-5. [Codes, 1880, § 2634; 1892, § 3709; 1906, § 4216; Hemingway's 1917, § 3045; 1930, § 3081; 1942, § 2843]

§ 11-37-7. [Codes, Hutchinson's 1848, ch. 56, art. 11 (3); 1857, ch. 56, art. 3; 1871, § 1530; 1880, § 2614; 1892, § 3710; 1906, § 4217; Hemingway's 1917, § 3046; 1930, § 3082; 1942, § 2844]

§ 11-37-9. [Codes, 1880, § 2636; 1892, § 3711; 1906, § 4218; Hemingway's 1917, § 3047; 1930, § 3083; 1942, § 2845]

§ 11-37-11. [Codes, 1880, § 2615; 1892, § 3712; 1906, § 4219; Hemingway's 1917, § 3048; 1930, § 3084; 1942, § 2846]

§ 11-37-13. [Codes, 1880, § 2639; 1892, § 3713; 1906, § 4220; Hemingway's 1917, § 3049; 1930, § 3085; 1942, § 2847]

§ 11-37-15. [Codes, 1880, § 2622; 1892, § 3714; 1906, § 4221; Hemingway's 1917, § 3050; 1930, § 3086; 1942, § 2848]

§ 11-37-17. [Codes, Hutchinson's 1848, ch. 56, art. 11 (3); 1857, ch. 56, art. 3; 1871, § 1531; 1880, § 2616; 1892, § 3715; 1906, § 4222; Hemingway's 1917, § 3051; 1930, § 3087; 1942, § 2849; Laws, 1924, ch. 166]

§ 11-37-19. [Codes 1892, § 3716; 1906, § 4223; Hemingway's 1917, § 3052; 1930, § 3088; 1942, § 2850]

§ 11-37-21. [Codes, Hutchinson's 1848, ch. 56, art. 11 (3); 1857, ch. 56, art. 3; 1871, § 1531; 1880, § 2617; 1892, § 3717; 1906, § 4224; Hemingway's 1917, § 3053; 1930, § 3089; 1942, § 2851; Laws, 1926, ch. 151]

§ 11-37-23. [Codes, 1892, § 3718; 1906, § 4225; Hemingway's 1917, § 3054; 1930, § 3090; 1942, § 2852]

§ 11-37-25. [Codes, 1880, § 2638; 1892, § 3719; 1906, § 4226; Hemingway's 1917, § 3055; 1930, § 3091; 1942, § 2853]

§ 11-37-27. [Codes, Hutchinson's 1848, ch. 56, art. 11 (8); 1857, ch. 56, art. 9; 1871, § 1536; 1880, § 2626; 1892, § 3720; 1906, § 4227; Hemingway's 1917, § 3056; 1930, § 3092; 1942, § 2854]

§ 11-37-29. [Codes, Hutchinson's 1848, ch. 56, art. 11 (9); 1857, ch. 56, art. 10; 1871, § 1537; 1880, § 2627; 1892, § 3721; 1906, § 4228; Hemingway's 1917, § 3057; 1930, § 3093; 1942, § 2855]

§ 11-37-31. [Codes, 1880, § 2618; 1892, § 3722; 1906, § 4229; Hemingway's 1917, § 3058; 1930, § 3094; 1942, § 2856]

§ 11-37-33. [Codes, 1880, § 2619; 1892, § 3723; 1906, § 4230; Hemingway's 1917, § 3059; 1930, § 3095; 1942, § 2857]

§ 11-37-35. [Codes, 1880, § 2620; 1892, § 3724; 1906, § 4231; Hemingway's 1917, § 3060; 1930, § 3096; 1942, § 2858]

§ 11-37-37. [Codes, Hutchinson's 1848, ch. 56, art. 11 (4); 1857, ch. 56, art. 4; 1871, § 1532; 1880, § 2621; 1892, § 3725; 1906, § 4232; Hemingway's 1917, § 3061; 1930, § 3097; 1942, § 2859; Laws, 1960, ch. 269]

§ 11-37-39. [Codes, Hutchinson's 1848, ch. 56, art. 11 (5); 1857, ch. 56, art. 5; 1871, § 1533; 1880, § 2622; 1892, § 3726; 1906, § 4233; Hemingway's 1917, § 3062; 1930, § 3098; 1942, § 2860]

§ 11-37-41. [Codes, 1880, § 2623; 1892, § 3727; 1906, § 4234; Hemingway's 1917, § 3063; 1930, § 3099; 1942, § 2861]

§ 11-37-43. [Codes, 1880, § 2623; 1892, § 3728; 1906, § 4235; Hemingway's 1917, § 3064; 1930, § 3100; 1942, § 2862]

§ 11-37-45. [Codes, 1857, ch. 56, art. 7; 1871, § 1535; 1880, § 2624; 1892, § 3729; 1906, § 4236; Hemingway's 1917, § 3065; 1930, § 3101; 1942, § 2863]

§ 11-37-47. [Codes, 1880, § 2628; 1892, § 3730; 1906, § 4237; Hemingway's 1917, § 3066; 1930, § 3102; 1942, § 2864]

§ 11-39-49. [Codes, 1880, § 2629; 1892, § 3731; 1906, § 4238; Hemingway's 1917, § 3067; 1930, § 3103; 1942, § 2865]

§ 11-39-51. [Codes, 1880, § 2630; 1892, § 3732; 1906, § 4239; Hemingway's 1917, § 3068; 1930, § 3104; 1942, § 2866]

§ 11-39-53. [Codes, 1880, § 2631; 1892, § 3733; 1906, § 4240; Hemingway's 1917, § 3069; 1930, § 3105; 1942, § 2867]

§ 11-39-55. [Codes, 1880, § 2632; 1892, § 3734; 1906, § 4241; Hemingway's 1917, § 3070; 1930, § 3106; 1942, § 2868]

§ 11-39-57. [Codes, 1880, § 2633; 1892, § 3735; 1906, § 4242; Hemingway's 1917, § 3071; 1930, § 3107; 1942, § 2869]

Editor's Notes — Laws of 1975, ch. 508, § 30, effective July 1, 1975, additionally provides that "nothing in this act shall be construed to defeat or affect in any manner whatsoever any proceeding or cause of action commenced prior to the effective date of this act under the authority of the statutes hereby repealed." As to current statutory provisions dealing with replevin actions, see § 11-37-101 et seq.

Former § 11-37-1 related to how replevin commenced.

Former § 11-37-3 related to form of affidavit.

Former § 11-37-5 related to venue.

Former § 11-37-7 related to the writ.

Former § 11-37-9 related to form of the writ.

Former § 11-37-11 related to how and when writ may be executed.

Former § 11-37-13 related to form of return of officer.

Former § 11-37-15 related to officer's valuation prima facie evidence.

Former § 11-37-17 related to property restored to defendant on bond.

Former § 11-37-19 related to form of bond by defendant.

Former § 11-37-21 related to plaintiff may give bond and receive property — bond to cover damage to, or depreciation in value of, property covered.

Former § 11-37-23 related to plaintiff in certain cases has first right to bond.

Former § 11-37-25 related to form of plaintiff's replevin bond.

Former § 11-37-27 related to bond returned, and may be excepted to.

Former § 11-37-29 related to new bond may be required.

Former § 11-37-31 related to property to be sold, when.

Former § 11-37-33 related when property not taken, plaintiff may elect to recover damages.

Former § 11-37-35 related to duplicate, alias, and pluries writs, and publication.

Former § 11-37-37 related to the pleadings.

Former § 11-37-39 related to judgment for plaintiff — default — writ of inquiry.

Former § 11-37-41 related to judgment for defendant — default — writ of inquiry.

Former § 11-37-43 related to judgment where no bond is given.

Former § 11-37-45 related to execution.

Former § 11-37-47 related to claim of property by third person.

Former § 11-37-49 related to claim of property by third person — issue, trial and judgment.

Former § 11-37-51 related to claim of property by third person — judgment in favor of claimant.

Former § 11-37-53 related to claim of property by third person — claimant considered a plaintiff.

Former § 11-37-55 related to laws applicable in case of death.

Former § 11-37-57 related to replevin not maintainable in certain cases.

§ 11-37-101. How replevin commenced; immediate seizure of property sought.

If any person, his agent or attorney, shall file a complaint under oath setting forth:

- (a) A description of any personal property;
- (b) The value thereof, giving the value of each separate article and the value of the total of all articles;
- (c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
- (d) That the property is in the possession of the defendant; and
- (e) That the defendant wrongfully took and detains or wrongfully detains the same; and shall present such pleadings to a justice of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice court judge or other duly elected judge, such justice or judge may issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said complaint, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the complaint, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff. The said writ shall be directed to the sheriff or other lawful officer, returnable as a summons before the proper circuit or county court where the value of the property, as alleged in the complaint, exceeds the jurisdictional amount of the justice court, or to the circuit or county court or the proper justice court if the value shall not exceed such amount. The complaint along with the order of the court, the writ of replevin with the officer's return thereon, and the bond of the plaintiff shall be filed in the proper court at once. Writs of replevin may be made returnable to the proper court of another county where the property may be found.

HISTORY: Laws, 1975, ch. 508, § 1; Laws, 1990, ch. 344, § 1, eff from and after July 1, 1990.

Cross References — Attachment of perishable commodities, see §§ 11-1-43 to 11-1-49 and 11-1-55.

Proceedings in replevin, attachment, and enforcement of liens, see § 11-9-135.

Attachment against parters, see § 11-33-5.

Replevin of attached property, see §§ 11-33-45 et seq.

Alternative procedure where immediate seizure of property is not sought, see §§ 11-37-131 et seq.

Cases in which replevin is not maintainable, see § 11-37-155.

Replevy of an animal, see § 69-13-27.

Repossession by secured party of collateral by action under Uniform Commercial Code, see § 75-9-609.

Replevy of exempt property wrongfully levied upon, see § 85-3-9.

Posting of bond and replevy of property seized, see § 85-7-47.

Selling of goods not replevied, see § 89-7-69.

Procedure when goods are replevied, see §§ 89-7-89 et seq.

Salvage of abandoned boats, logs, etc., see §§ 89-17-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.

1. In general.

Circuit court properly affirmed the dismissal of a former mother-in-law's complaint for replevin of two rings, a cameo, and a figurine against her former daughter-in-law because while the former mother-in-law put on proof of the value of the rings, the circuit court determined that the former daughter-in-law had not wrongfully retained the property inasmuch as it was awarded to her in her divorce. *Stevens v. Grissom*, 214 So. 3d 298, 2017 Miss. App. LEXIS 154 (Miss. Ct. App. 2017).

Trial court acted within its authority in ruling on a tenant's unlawful-reentry issue against a landlord because the tenant's claims against both the towing company which removed vehicles from the tenant's leased premises and the landlord stemmed from the landlord's action in using self-help to have the vehicles removed. *Crowell v. Butts*, 153 So. 3d 719, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. 2013), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 395 (Miss. 2014), aff'd in part and rev'd in part, 153 So. 3d 684, 2014 Miss. LEXIS 530 (Miss. 2014).

Because issues regarding the possessory rights of the parties remained unresolved, remand for a new trial on the merits was warranted to determine which party had a superior possessory right, under Miss. Code Ann. §§ 11-37-101 and 85-7-251, to vehicles which a towing company towed from an auto repairman's leased premises at the landlord's direction. *Crowell v. Butts*, 153 So. 3d 719, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. 2013), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 395 (Miss. 2014), aff'd in part and rev'd in part, 153 So. 3d 684, 2014 Miss. LEXIS 530 (Miss. 2014).

Tenant, who operated an auto repair business on leased premises, met the statutory requirements to maintain a replevin action against the towing company for the return of the tenant's vehicles,

when the towing company removed and stored the vehicles at the landlord's direction. Further, the tenant, who claimed possession of the vehicles under the theory of bailment, was not required to show title ownership of the vehicles or a written and documented mechanic's lien. *Crowell v. Butts*, 153 So. 3d 719, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. 2013), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 395 (Miss. 2014), aff'd in part and rev'd in part, 153 So. 3d 684, 2014 Miss. LEXIS 530 (Miss. 2014).

After reviewing the replevin code provisions, Miss. Code Ann. § 11-37-101 through Miss. Code Ann. § 11-37-157, the appellate court found no requirement that a replevin order had to be issued by means of an agreed order, and nothing indicated that the trial court was without authority to enter a non-agreed order, which was essentially what it did, and any error on the part of the trial court simply did not rise to the level of reversible error where the order merely enforced a settlement agreement to which the husband had already agreed. *Madison v. Madison*, 922 So. 2d 832, 2006 Miss. App. LEXIS 127 (Miss. Ct. App. 2006).

Prisoner, who was proceeding pro se in replevin action against police officers, failed to set forth proof that property was in possession of officers, and thus prisoner failed to meet essential element of his claim and officers were entitled to judgment as matter of law. *Hyde v. State*, 666 So. 2d 445, 1995 Miss. LEXIS 639 (Miss. 1995).

Section 11-37-101 was redrafted by the legislature after it was found to be unconstitutional in *Wyatt v. Cole* (S.D. Miss. 1989) 710 F. Supp. 180, and the statute now meets minimum due process requirements. *Underwood v. Foremost Financial Services Corp.*, 563 So. 2d 1387, 1990 Miss. LEXIS 286 (Miss. 1990).

A circuit judge erred in deciding not to subject a creditor to liability for injurious violation of a debtor's constitutional right to due process when the creditor seized the debtor's mobile home and furnishings in compliance with § 11-37-101 simply because the creditor acted pursuant to a

presumptively valid (albeit unconstitutional) statute. An evidentiary hearing should have been held, and the creditor's claim of good faith reliance on a presumptively valid statute should have been considered in light of not only the sincerity in its belief that it was acting properly, but the reasonableness of its actions under the circumstances. A fact finder conceivably could have concluded that the creditor's "surprise" seizure of the debtor's mobile home and its contents was, under the circumstances, unreasonable and compensable, where the record indicated no explanation for the necessity of an immediate seizure. *Underwood v. Foremost Financial Services Corp.*, 563 So. 2d 1387, 1990 Miss. LEXIS 286 (Miss. 1990).

Replevin proceedings are governed by statute (§§ 11-37-101 et seq.), supplemented only by so much of Mississippi Rules of Civil Procedure as are not inconsistent with statute. *Hall v. Corbin*, 478 So. 2d 253, 1985 Miss. LEXIS 2274 (Miss. 1985).

Since agreed judgment in replevin action was entered by consent, the fixing of the indebtedness was appropriate; however, absent clear agreement between parties, there can be no transfer of title from

the debtor to the creditor. In *re Fred's Dollar Store, Inc.*, 44 B.R. 491, 1984 Bankr. LEXIS 4573 (Bankr. N.D. Miss. 1984).

A default judgment in a replevin action would be set aside where the value of each separate article, as required by statute, was not given in the declaration or in the final judgment, and where the location of the hearing on the writ of inquiry was contrary to the order entered on the minutes of the court. *Birdsong v. Trans-American Van Service, Inc.*, 369 So. 2d 751, 1979 Miss. LEXIS 1968 (Miss. 1979).

2. Applicability.

Bond requirement of Miss. Code Ann. § 11-37-101 did not apply because a loan servicer commenced its action under Miss. Code Ann. § 11-37-131 and did not seek immediate possession of the borrowers' recreational vehicle. Thus, the circuit court was under no statutory requirement to set a bond amount or require the loan servicer to post bond when it issued its third final judgment awarding the loan servicer possession of the vehicle. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111, 2013 Miss. App. LEXIS 760 (Miss. Ct. App. 2013).

RESEARCH REFERENCES

ALR.

Sufficiency of proof in replevin of defendant's possession at time of commencement of action. 2 A.L.R.2d 1043.

Remedy of replevin where agent, employed to purchase personal property, buys it for himself. 20 A.L.R.2d 1140.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 A.L.R.2d 418.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants. 93 A.L.R.2d 358.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property. 97 A.L.R.2d 896.

Replevin or claim-and-delivery: modern view as to validity of statute or contrac-

tual provision authorizing summary repossession of consumer goods sold under retail instalment sales contract. 45 A.L.R.3d 1233.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 1, 5 et seq.

Initiating pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 11 et seq.

Answers and other responsive pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 231 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 271 et seq. (prejudgment seizure or repossession).

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

Symposium on Mississippi Rules of

Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-37-103. Judge may determine value of bond.

Should the judge to whom such pleadings are presented determine that the property in question is not properly valued, then he may, in his order, require a bond in an amount double the value of the property in question, as determined by such judge.

HISTORY: Laws, 1975, ch. 508, § 2, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-105. Form of plaintiff's replevin bond.

The plaintiff's bond in replevin shall be in the following form, to-wit:

"Be it known, that we, _____, the principal and plaintiff, and _____ and _____, sureties, agree and bind ourselves to pay to _____, the defendant, the sum of \$_____, unless the said principal and plaintiff shall prosecute to effect his replevin action against the defendant for possession of (here describe the property in detail), now to be seized and delivered to the plaintiff; and shall, without delay, return said property to the defendant, if return thereof be adjudged, and shall pay to the defendant such damages as he may sustain by the wrongful suing out of a writ of replevin, and such costs as may be awarded against the plaintiff, and save harmless the officer who seizes and delivers said property to the plaintiff herein; otherwise to be of no force and effect.

WITNESS OUR SIGNATURES, this _____ day of _____, 2 _____.

The above bond is approved by me this _____ day of _____, 2 _____.

HISTORY: Laws, 1975, ch. 508, § 3, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin § 47.

§ 11-37-107. Venue.

The action of replevin may be instituted in the circuit or county court of a county or in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

HISTORY: Laws, 1975, ch. 508, § 4; Laws, 1981, ch. 471, § 37; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — Laws of 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Venue of actions generally, see §§ 11-11-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR.

Proper county for bringing possessory action. 60 A.L.R.2d 487.

Am. Jur.

66 Am. Jur. 2d, Replevin § 41.

§ 11-37-109. The writ.

The writ of replevin shall command the sheriff, or other lawful officer, to immediately seize and take possession of the property described in the writ and deliver it to the plaintiff after two (2) days, unless bonded by the defendant, and summon the defendant to appear before the court shown in the writ, in termtime or in vacation, and to answer to the action of the plaintiff.

HISTORY: Laws, 1975, ch. 508, § 5, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 48 et seq.

§ 11-37-111. Form of the writ.

The writ of replevin shall be in the following form, to-wit:

“State of Mississippi

County of _____

To the sheriff of any lawful officer of _____ County:

We command you to immediately seize and take into your possession (here describe the property as shown in the declaration) alleged by _____, the plaintiff, to be wrongfully detained by _____, the defendant, and to deliver said property to the plaintiff unless bonded by the defendant; and to summon the said defendant to appear before the _____ court of _____ County, Mississippi, at _____ o'clock _____M., on the _____ day of _____, 2 _____, to answer the suit of the plaintiff for the wrongful detention of said property, and have then and there this writ.

WITNESS MY HAND, this _____ day of _____, 2 _____.

_____”

HISTORY: Laws, 1975, ch. 508, § 6, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-113. How writ may be executed.

The writ may be executed by seizing the property described therein and summoning the defendant as in other civil actions, with a copy of the declaration and exhibits attached thereto to be attached to said writ, so as to fully inform the defendant as to the claim being made against him.

HISTORY: Laws, 1975, ch. 508, § 7, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 63 et seq.

§ 11-37-115. Property restored to defendant on bond.

If the defendant shall, within two (2) days from the seizure of the property, enter into bond, with sufficient sureties, to be approved by the officer or the court, payable to the plaintiff, in double the value of the property, conditioned

that it shall be forthcoming to satisfy the judgment of the court, the property shall be restored to him pending final judgment.

HISTORY: Laws, 1975, ch. 508, § 8, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 50.

§ 11-37-117. Form of return of officer.

The officer's return on such writ may be in the following form, to-wit:

"Executed the within writ, by taking possession of (here describe the property described in the writ which has been seized by the officer) found in the possession of the defendant, and by summoning the defendant (naming him) according to the command of said writ, and I have delivered him a true copy of the writ, declaration and exhibits (or otherwise, as the case may be). The plaintiff (or defendant) having entered into bond, conditioned according to law, I delivered said property to the plaintiff (or defendant) and now return said writ.

This _____ day of _____, 2 _____.

Sheriff"

HISTORY: Laws, 1975, ch. 508, § 9, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-119. New bond may be required of plaintiff.

If the defendant in a replevin suit shall at any time deem any bond taken to be insufficient, such defendant may, upon filing a motion in the court where the suit is pending, obtain a hearing to determine the sufficiency of such bond. The court shall, after hearing the evidence upon such motion determine the sufficiency or insufficiency of the bond. If the bond given by the plaintiff be adjudged insufficient, the plaintiff shall be required to give a new and sufficient bond, or restore the property to the defendant within the time limited by the court; and, in default thereof, the defendant shall be entitled to proceed and enter judgment as in case the plaintiff had nonsuited or otherwise made default.

HISTORY: Laws, 1975, ch. 508, § 10, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
jdufl

1. In general.

jdufl

It is not necessary to take exception to

the sufficiency of a replevin bond as a prerequisite to causing the sheriff to be liable thereon for his lack of reasonable care in determining the sufficiency of the sureties. *McKenzie v. Curet*, 313 So. 2d 396, 1975 Miss. LEXIS 1672 (Miss. 1975).

§ 11-37-121. When property not taken, plaintiff may elect to recover damages.

If the return of the officer on the writ shows a failure to take the goods and chattels, but the defendant has been summoned, the plaintiff may declare and prosecute the action for the recovery of the value of the property, and damages for the taking or detention of the property, as if he had thus commenced his action, and the plaintiff and his sureties shall, upon motion, be discharged on their bond.

HISTORY: Laws, 1975, ch. 508, § 11, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR.

Interest on value of property where property itself cannot be recovered. 36 A.L.R.2d 404.

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 66 et seq.

§ 11-37-123. Duplicate, alias, and pluries writs or process, and publication.

The plaintiff shall be entitled to duplicate writs or process to other counties, and alias and pluries writs or process to take the property or to summon the defendant, as in other actions. When property shall be taken under the writ, but the defendant cannot be found, the defendant shall be notified by publication, as provided in case of attachment under like circumstances, as provided in Section 11-33-37, Mississippi Code of 1972, except that said cause may be triable five (5) days after completion of publication.

HISTORY: Laws, 1975, ch. 508, § 12, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin § 48.

§ 11-37-125. Trial of replevin actions.

All replevin actions, whether followed by writ of replevin as herein provided or by summons, as hereinafter provided, shall be triable in termtime or in vacation, and the court or judge having jurisdiction shall proceed at such hearing to a final determination of the rights of the parties to possession, provided at least five (5) days process has been had upon the defendant.

HISTORY: Laws, 1975, ch. 508, § 13, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-127. Judgment for plaintiff.

If, upon a trial, the judgment shall be for the plaintiff, he shall retain possession of the property delivered to him under the writ of replevin, or if said property has not been found, then the plaintiff shall have a judgment for its value as determined by such hearing, or the value of the plaintiff's interest therein. Upon the entry of a judgment for the plaintiff in such replevin action, the plaintiff and the sureties on his bond shall be fully and finally discharged and said bond cancelled. If the defendant shall have bonded the property after seizure and the judgment shall be for the plaintiff, then such judgment shall be that the defendant shall immediately deliver up said property to the plaintiff, with the defendant and the sureties on his bond to be liable to the plaintiff for any damage to or depreciation in the value of such property from the date of its surrender to the defendant under his bond until the date of its surrender by the defendant in obedience to the judgment of the court, in addition to any other damage the plaintiff may have sustained by reason of the wrongful taking or detention of such property by the defendant, all as determined upon writ of inquiry; or that the plaintiff recover from the defendant and his sureties the value of said property at the date of its return to the defendant under bond.

HISTORY: Laws, 1975, ch. 508, § 14, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Judgment for value.

1. In general.

The trial court in a replevin action erred in submitting the combined issues of possession and damages for decision by the

jury at the same time; if either party to such an action seeks damages, they must be sought after judgment on the issue of possession on a writ of inquiry, and not by way of counterclaim or recoupment filed with the answer. *Finance America Private Brands, Inc. v. Durbin*, 370 So. 2d 1356, 1979 Miss. LEXIS 2047 (Miss. 1979).

2. Judgment for value.

In a case seeking replevin and contractual damages, there was uncontroverted

testimony that none of a drug company's collateral remained within the debtor's possession or control; therefore, it was not error to order the debtor to pay the value of the property that could not be discovered and returned. A corporate representative testified that he looked into the debtor's closed store and observed that the shelves were almost empty. *Cooley v. J.M. Smith Corp.*, 205 So. 3d 1167, 2016 Miss. App. LEXIS 402 (Miss. Ct. App. 2016).

RESEARCH REFERENCES

ALR.

Credit for upkeep or other expense in computing damages for use or detention of property in replevin. 7 A.L.R.2d 933.

Recovery of damages in replevin for usable value of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like. 33 A.L.R.2d 774.

Interest on damages for period before judgment for injury to or detention, loss or destruction of, property. 36 A.L.R.2d 337.

Allowance of loss of profits from deprivation of use of detained property. 48 A.L.R.2d 1053.

Recovery of attorney's fees as damages by successful litigant in replevin or detinue action. 60 A.L.R.2d 945.

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 64 et seq.

Verdict for plaintiff, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Form 531.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-37-129. Judgment for defendant; default; writ of inquiry.

If the judgment be for the defendant, the plaintiff and the sureties on the plaintiff's bond shall restore to the defendant the property, if to be had, or pay to him the value thereof and any damages for the wrongful suing out of the writ, as assessed upon writ of inquiry. If the defendant shall have made bond for such property, he and his sureties shall be fully discharged and he may recover any damages from the plaintiff and his sureties for the wrongful suing out of said writ. In case the plaintiff make default in prosecuting the replevin action, or be nonsuited, after seizure under writ of replevin, the defendant may have a writ of inquiry to assess the value of the property, or the damages sustained by the wrongful suing out of the writ, or both, as the case may be; and like judgment shall be rendered upon the finding as upon an issue found for him.

HISTORY: Laws, 1975, ch. 508, § 15, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.

1. In general.

In an action by a person whose agent pledged equipment as security for a bank overdraft seeking to replevy a truck and trailer from the possession of a person who had obtained possession of the equipment by paying off a lien held by the bank, the trial court improperly granted a monetary judgment against plaintiff for the amount of defendant's lien, where the trial court made no finding as to who was entitled to possession of the property, and replevin is a possessory action only. *Ferris v. Hawkins*, 418 So. 2d 811, 1982 Miss. LEXIS 2117 (Miss. 1982).

The trial court in a replevin action erred in submitting the combined issues of possession and damages for decision by the jury at the same time; if either party to such an action seeks damages, they must be sought after judgment on the issue of possession on a writ of inquiry, and not by

way of counterclaim or recoupment filed with the answer. *Finance America Private Brands, Inc. v. Durbin*, 370 So. 2d 1356, 1979 Miss. LEXIS 2047 (Miss. 1979).

2. Jurisdiction.

Trial court lacked subject matter jurisdiction to enter a writ of inquiry under Miss. Code Ann. § 11-37-129 where: (1) the replevin action was filed under Miss. Code Ann. § 11-37-131 since the property was not pre-seized; (2) § 11-37-131 did not provide for a writ of inquiry; and (3) jurisdiction ended when the replevin action ended; (4) neither party appealed the grant of defendant's motion to set aside the replevin, which was effectively a Miss. R. Civ. P. 60(b)(4) motion; and (5) the procedures for the replevin were under Miss. Code Ann. §§ 11-37-141 and 11-37-143, which did not provide for a writ of inquiry. *Magee v. Covington County Bank*, 119 So. 3d 1053, 2012 Miss. App. LEXIS 591 (Miss. Ct. App. 2012), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 408 (Miss. 2013).

RESEARCH REFERENCES

ALR.

Interest on damages for period before judgment for injury to or detention, loss or destruction of, property. 36 A.L.R.2d 337.

Recovery of attorney's fees as damages by successful litigant in replevin or detainue action. 60 A.L.R.2d 945.

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 64 et seq.

Verdict for defendant, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Form 532.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-37-131. How replevin commenced—immediate seizure of property not sought.

If any person, his agent or attorney, shall desire to institute an action of replevin without the necessity of posting bond, and without requesting the immediate seizure of the property in question, he shall file a declaration under oath setting forth those matters shown in subparagraphs (a) through (e) of Section 11-37-101 and shall present such pleadings to a judge of the Supreme Court, a judge of the circuit court, a chancellor, a county judge, a justice of the peace or other duly elected judge, and such judge shall issue a fiat directing the clerk of such court, or a deputy clerk, to issue a summons to the defendant, to

appear before a court or judge having jurisdiction, as determined by the value of the property as alleged in the declaration, and as outlined in Section 11-37-101, with said process being returnable in termtime or in vacation, upon at least five (5) days' notice, summoning the defendant to appear for a final hearing to determine the rights of the parties as to possession, and upon such final hearing the court shall enter judgment accordingly.

HISTORY: Laws, 1975, ch. 508, § 16, eff from and after passage (approved April 8, 1975).

Cross References — Alternative procedure where immediate seizure of property is sought, see §§ 11-37-101 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction.
2. Due process.
3. Possession properly granted to lender.
4. Bond.
5. Judgment for value.
6. Damages award.

1. Jurisdiction.

Trial court lacked subject matter jurisdiction to enter a writ of inquiry under Miss. Code Ann. § 11-37-129 where: (1) the replevin action was filed under Miss. Code Ann. § 11-37-131 since the property was not pre-seized; (2) § 11-37-131 did not provide for a writ of inquiry; and (3) jurisdiction ended when the replevin action ended; (4) neither party appealed the grant of defendant's motion to set aside the replevin, which was effectively a Miss. R. Civ. P. 60(b)(4) motion; and (5) the procedures for the replevin were under Miss. Code Ann. §§ 11-37-141 and 11-37-143, which did not provide for a writ of inquiry. *Magee v. Covington County Bank*, 119 So. 3d 1053, 2012 Miss. App. LEXIS 591 (Miss. Ct. App. 2012), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 408 (Miss. 2013).

2. Due process.

Circuit court erred in awarding a business owner damages for the storage of an antique truck when the business owner never filed a responsive pleading or a separate cause of action giving the truck owner notice in the truck driver's replevin

action that the business owner was seeking storage fees because the due process rights of the truck owner were violated. *Stratton v. McKey*, 204 So. 3d 1245, 2016 Miss. LEXIS 508 (Miss. 2016).

3. Possession properly granted to lender.

Because the parties were allowed to argue their claims to certain equipment, and because the buyer did not dispute that the lender had a valid prior, perfected security interest in the equipment by virtue of a properly filed financing statement, the lender was entitled to possession of the equipment under Miss. Code Ann. § 11-37-131. *Hammond v. Caterpillar Fin. Servs. Corp.*, 66 So. 3d 700, 2011 Miss. App. LEXIS 347 (Miss. Ct. App. 2011).

4. Bond.

Bond requirement of Miss. Code Ann. § 11-37-101 did not apply because a loan servicer commenced its action under Miss. Code Ann. § 11-37-131 and did not seek immediate possession of the borrowers' recreational vehicle. Thus, the circuit court was under no statutory requirement to set a bond amount or require the loan servicer to post bond when it issued its third final judgment awarding the loan servicer possession of the vehicle. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111, 2013 Miss. App. LEXIS 760 (Miss. Ct. App. 2013).

5. Judgment for value.

In a case seeking replevin and contrac-

tual damages, there was uncontroverted testimony that none of a drug company's collateral remained within the debtor's possession or control; therefore, it was not error to order the debtor to pay the value of the property that could not be discovered and returned. A corporate representative testified that he looked into the debtor's closed store and observed that the shelves were almost empty. *Cooley v. J.M. Smith Corp.*, 205 So. 3d 1167, 2016 Miss. App. LEXIS 402 (Miss. Ct. App. 2016).

6. Damages award.

Because damages resulting from a replevin were not authorized by statute and because the owner of an antique truck failed to put forward any evidence of damages at trial, damages could not be awarded in the case sub judice. *Stratton v. McKey*, 204 So. 3d 1245, 2016 Miss. LEXIS 508 (Miss. 2016).

RESEARCH REFERENCES

ALR.

Sufficiency of proof in replevin of defendant's possession at time of commencement of action. 2 A.L.R.2d 1043.

Conversion as precluded by resort to replevin. 3 A.L.R.2d 230.

Remedy of replevin where agent, employed to purchase personal property, buys it for himself. 20 A.L.R.2d 1140.

Action by landowner for recovery by possession of cut timber after revocation of license. 26 A.L.R.2d 1197.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 A.L.R.2d 418.

Maintenance of replevin or similar possessory remedy by cotenant, or security transaction creditor thereof, against other cotenants. 93 A.L.R.2d 358.

Maintainability of replevin or similar possessory action where defendant, at

time action is brought, is no longer in possession of property. 97 A.L.R.2d 896.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail instalment sales contract. 45 A.L.R.3d 1233.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 1, 5 et seq. Initiating pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 11 et seq.

Answers and other responsive pleadings, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 231 et seq.

§ 11-37-133. Form of summons.

The summons may be in the following form, to-wit:

"The State of Mississippi

To the sheriff of _____ County, Greetings:

We command you hereby that you summons _____, (put full address) defendant, if to be found in your county, so that he be and appear before the _____ court, to be holden in and for the County of _____, at the courthouse thereof in the City of _____, Mississippi, on the _____ day of _____, 2 _____, at _____ o'clock _____M., to answer the plaintiff's declaration in replevin filed herein, a copy of which is attached hereto, and for a final hearing to determine the rights of the parties herein as to the possession of the property as described in the declaration in replevin.

Declaration filed when summons issued.

ISSUED THIS _____ day of _____, 2 _____.

_____ Clerk"

HISTORY: Laws, 1975, ch. 508, § 17, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-135. How summons shall be executed.

The summons in replevin shall be executed by summoning the defendant as in other civil cases, a copy of the declaration and exhibits being attached to said summons, directing the defendant to appear before the court shown in said summons, to answer the plaintiff's declaration under oath. The officer serving said process shall determine whether or not the defendant is then in possession of the property described in the declaration and shall so indicate on his return.

HISTORY: Laws, 1975, ch. 508, § 18, eff from and after passage (approved April 8, 1975).

Cross References — Summons and their execution generally, see §§ 13-3-5 et seq. Seizure of person or property, see Miss. R. Civ. P. 64.

OPINIONS OF THE ATTORNEY GENERAL

A summons for a replevin hearing wherein the property is not immediately seized may be served by placing a true copy on the door of the defendant's usual place of abode. Parker, May 3, 2002, A.G. Op. #02-0225.

A constable may serve a summons for a

replevin by any of the means set forth in Section 13-3-5; if the constable is unable to determine whether or not the defendant is in possession of the property described in the declaration, he should note such on the return. Enlow, Nov. 15, 2002, A.G. Op. #02-0646.

§ 11-37-137. Contempt of defendant for concealing or disposing of property.

If the defendant be found to be in possession of the property in question at the time of the service of process upon him, and if he shall conceal said property or dispose of the same, or fail to have the same within the jurisdiction of the court for such final judgment as may be rendered by the court in said replevin action, upon the return day of process herein, he shall be subject to penalties of contempt, upon motion of the plaintiff or order of the court.

HISTORY: Laws, 1975, ch. 508, § 19, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-139. Resettlement of action for trial on a future date.

Where process in any replevin action is by way of a summons in replevin, said cause shall be triable on its merits upon at least five (5) days process upon the defendant, and said cause shall be triable in termtime or in vacation and at such place as the court may direct. In the event it shall appear at the return day that there is secondary service of process, or less than five (5) days process upon the defendant, the court may enter an order resetting said matter for trial on a future date, so as to insure that said cause will not be tried on its merits except upon a resetting on secondary process or except upon at least five (5) days process upon the defendant. In the event of such order resetting said cause for such later date, it shall not be necessary that further process be served upon the defendant.

HISTORY: Laws, 1975, ch. 508, § 20, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

OPINIONS OF THE ATTORNEY GENERAL

When the judge hears the case, pursuant to the terms of this section, the judgment would be for possession of the property, or if the property has not been found, then the judgment shall be for its value or the value of the plaintiff's interest therein. Mullen, Dec. 10, 2004, A.G. Op. 04-0585.

§ 11-37-141. Judgment for plaintiff where property not previously seized.

Upon the trial of any replevin action in which the property has not previously been seized under writ of replevin, if the judgment be for the plaintiff, the court shall enter judgment awarding to the plaintiff the immediate possession of the property and such judgment shall order and direct the sheriff or other lawful officer to immediately seize the property in question, without further process upon the defendant, and deliver said property to the plaintiff, a certified copy of the final judgment rendered in such case being furnished to the sheriff as evidence of his authority to seize such property and deliver it to the plaintiff.

HISTORY: Laws, 1975, ch. 508, § 21, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction.
2. Damages award.

1. Jurisdiction.

Trial court lacked subject matter jurisdiction to enter a writ of inquiry under Miss. Code Ann. § 11-37-129 where: (1)

the replevin action was filed under Miss. Code Ann. § 11-37-131 since the property was not pre-seized; (2) § 11-37-131 did not provide for a writ of inquiry; and (3) jurisdiction ended when the replevin action ended; (4) neither party appealed the grant of defendant's motion to set aside the replevin, which was effectively a Miss. R. Civ. P. 60(b)(4) motion; and (5) the procedures for the replevin were under Miss. Code Ann. §§ 11-37-141 and 11-37-143, which did not provide for a writ of inquiry. *Magee v. Covington County Bank*, 119 So. 3d 1053, 2012 Miss. App. LEXIS

591 (Miss. Ct. App. 2012), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 408 (Miss. 2013).

2. Damages award.

Because damages resulting from a replevin were not authorized by statute and because the owner of an antique truck failed to put forward any evidence of damages at trial, damages could not be awarded in the case sub judice. *Stratton v. McKey*, 204 So. 3d 1245, 2016 Miss. LEXIS 508 (Miss. 2016).

OPINIONS OF THE ATTORNEY GENERAL

A constable may enter a dwelling to seize property as commanded by a writ of replevin, but such entering must be done without a breach of the peace; further, obtaining entry into a rented house or

apartment by means of the landlord in order to seize replevied property is a proper action to be taken by the constable. *Sherrell*, March 10, 1999, A.G. Op. #99-0035.

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 64 et seq.
Judgment for plaintiff where property

not previously delivered, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Form 536.

§ 11-37-143. Judgment for defendant where property not previously seized.

In any replevin action in which the property has not been previously seized by writ of replevin, if the defendant be successful in such action, the judgment of the court shall be that the declaration of the plaintiff be dismissed and court costs assessed against the plaintiff.

HISTORY: Laws, 1975, ch. 508, § 22, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

ANALYSIS

1. Jurisdiction.
2. Damages award.

1. Jurisdiction.

Trial court lacked subject matter jurisdiction to enter a writ of inquiry under Miss. Code Ann. § 11-37-129 where: (1)

the replevin action was filed under Miss. Code Ann. § 11-37-131 since the property was not pre-seized; (2) § 11-37-131 did not provide for a writ of inquiry; and (3) jurisdiction ended when the replevin action ended; (4) neither party appealed the grant of defendant's motion to set aside the replevin, which was effectively a Miss. R. Civ. P. 60(b)(4) motion; and (5) the

procedures for the replevin were under Miss. Code Ann. §§ 11-37-141 and 11-37-143, which did not provide for a writ of inquiry. *Magee v. Covington County Bank*, 119 So. 3d 1053, 2012 Miss. App. LEXIS 591 (Miss. Ct. App. 2012), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 408 (Miss. 2013).

plevin were not authorized by statute and because the owner of an antique truck failed to put forward any evidence of damages at trial, damages could not be awarded in the case sub judice. *Stratton v. McKey*, 204 So. 3d 1245, 2016 Miss. LEXIS 508 (Miss. 2016).

2. Damages award.

Because damages resulting from a re-

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 64 et seq.
Judgment for defendant, 21 Am. Jur. Pl

& Pr Forms (Rev), Replevin, Forms 537 et seq.

§ 11-37-145. Replevin actions to be treated as preference cases.

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

HISTORY: Laws, 1975, ch. 508, § 23, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Summary judgment.

Summary judgment was an appropriate means to determine the possessory rights to a recreational vehicle because the judge's use of Miss. R. Civ. P. 56 supplemented – and was not inconsistent with –

the requirement under Miss. Code Ann. § 11-37-145 that replevins be resolved as early as possible. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111, 2013 Miss. App. LEXIS 760 (Miss. Ct. App. 2013).

§ 11-37-147. Jury trial.

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

HISTORY: Laws, 1975, ch. 508, § 24, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-149. Claim of property by third person.

If a third person, not a party to the action of replevin, shall claim to be the owner or entitled to the possession of goods or chattels involved in a replevin

action, he shall not be allowed to institute another action of replevin while the former is pending, but may intervene in said action and present his claim under oath.

HISTORY: Laws, 1975, ch. 508, § 25, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Mississippi Rule Civil Procedure 24 is supplementary to statute (§ 11-37-149) governing intervention in replevin action, rather than inconsistent with statute. *Hall v. Corbin*, 478 So. 2d 253, 1985 Miss. LEXIS 2274 (Miss. 1985).

Party asserting nonpossessory interest in property which is subject of replevin

action may assert such interest within ancillary jurisdiction of circuit court, so long as there is common nucleus of operative fact between party's claim and original complaint in replevin, and such party may intervene in circuit court replevin action even though claim is of equitable origins. *Hall v. Corbin*, 478 So. 2d 253, 1985 Miss. LEXIS 2274 (Miss. 1985).

RESEARCH REFERENCES

Am. Jur.

66 Am. Jur. 2d, Replevin § 44.

Intervention, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 251 et seq.

§ 11-37-151. Claim of property by third person—issue, trial and judgment.

After the trial of the action of replevin, an issue shall be made between the successful party and the claimant as to the validity of his claim, and a trial shall be had to determine the right of possession as between them and judgment entered accordingly.

HISTORY: Laws, 1975, ch. 508, § 26, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-153. Laws applicable in case of death.

All the provisions of law in reference to the death of either party, and the revival of the cause in personal actions, and the death of any of the obligors in a bond given in a replevin action, and the proceedings thereon before and after judgment, shall apply in like case to the action of replevin, and to a claim of property in such action.

HISTORY: Laws, 1975, ch. 508, § 27, eff from and after passage (approved April 8, 1975).

Cross References — Death of party to action generally, see § 11-7-29. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Nonpossessory equitable claim of intervenor in replevin action survives death of intervenor, whose executor is permitted to

revive claim by intervention. *Hall v. Corbin*, 478 So. 2d 253, 1985 Miss. LEXIS 2274 (Miss. 1985).

§ 11-37-155. Replevin not maintainable in certain cases.

The action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode prescribed by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin.

HISTORY: Laws, 1975, ch. 508, § 28, eff from and after passage (approved April 8, 1975).

Cross References — How replevin is commenced, see §§ 11-37-101, 11-37-131. Replevy of exempt property levied upon, see § 85-3-9. Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-37-157. Replevin cumulative and additional to all other actions.

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

HISTORY: Laws, 1975, ch. 508, § 29, eff from and after passage (approved April 8, 1975).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Attorney's fees.

Because a loan servicer's right to attorney's fees under the terms of a loan agreement was in addition to its right to possess the borrowers' recreational vehicle,

the loan servicer did not have to prove it was entitled to punitive damages to be awarded attorney's fees. *Lacoste v. Sys. & Servs. Techs.*, 126 So. 3d 111, 2013 Miss. App. LEXIS 760 (Miss. Ct. App. 2013).

CHAPTER 38.

CLAIM AND DELIVERY

Sec.

- 11-38-1. Commencement of action.
- 11-38-3. Venue; issuance and return of process; jurisdiction of court; right to jury trial.
- 11-38-5. Preliminary hearing.
- 11-38-7. Answer; judgment.
- 11-38-9. Claim and delivery cumulative and additional to other actions.

§ 11-38-1. Commencement of action.

Any person with an enforceable lien on any personal property, or right to the immediate possession thereof, or who asserts that such property has been wrongfully taken or detained may bring an action for claim and delivery by filing a complaint in writing, under oath, describing the property, setting forth his claim, share or interest therein, attaching an itemized account, if required, and giving the names of any other persons who have a similar or other claims or interests in such property. Thereupon the clerk or justice shall issue a writ directed to the proper officer to value the property, or so much thereof as may be necessary to satisfy the plaintiff's demand and cost, and to summon the persons named in the affidavit to appear in court, at the time fixed, to answer the complaint.

HISTORY: Laws, 1973, ch. 400, § 1, eff from and after passage (approved March 28, 1973).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

Filing and service requirements for pleadings and motions in Circuit Courts, see Miss. U.R.C.C.C. 2.06.

JUDICIAL DECISIONS

1. In general.

The declaration in an action for claim and delivery brought by a bank against an automobile dealer and an automobile manufacturer credit corporation complied with the requirements of this section,

even though there was no allegation that the value of the property in question exceeded \$200. *Chrysler Credit Corp. v. Bank of Wiggins*, 358 So. 2d 714, 1978 Miss. LEXIS 2554 (Miss. 1978).

RESEARCH REFERENCES

ALR.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 A.L.R.2d 418.

Allowance, in replevin action, of loss of

profits from deprivation of use of detained property. 48 A.L.R.2d 1053.

Proper county for bringing replevin, or similar possessory action. 60 A.L.R.2d 487.

Maintenance of replevin or similar possessory remedy by cotenant, or security

transaction creditor thereof, against other cotenants. 93 A.L.R.2d 358.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property. 97 A.L.R.2d 896.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract. 45 A.L.R.3d 1233.

Construction and Application of Parrott-Hudson Doctrine, Providing That Where Deprivation of Property Interest Is Occasioned by Random and Unauthorized Conduct of State Officials, Procedural Due

Process Inquiry Is Limited to Issue of Adequacy of Postdeprivation Remedies Provided by State. 89 A.L.R.6th 1.

Am. Jur.

66 Am. Jur. 2d, Replevin §§ 3, 36 et seq.

CJS.

77 C.J.S., Replevin §§ 1, 38-41 et seq.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings - Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-38-3. Venue; issuance and return of process; jurisdiction of court; right to jury trial.

The action for claim and delivery may be instituted in the circuit or county court of a county, or the justice court of a county, in which the defendant, or one (1) of several of them, resides or where the property, or some of it, may be found. Proper process shall issue to other counties and shall be made returnable to the first term of the court held after the issuance of said writ unless it shall be issued more than ten (10) days before the said term of court, when it may be returnable to the judge of the court at the usual place of holding the court at a day to be named, not more than ten (10) days or less than five (5) days after the date of the issuance of the writ, or before the judge in vacation, and the cause will be triable, provided the defendant has been served with process at least five (5) days before the return day of the writ. The judge shall have jurisdiction to hear the cause, or any matter pertaining thereto, in termtime or vacation, at such time and place as he may direct, and to enter such orders and judgment thereon as to adjust the rights of the parties in the subject matter; and all such cases shall be tried by the judge without the intervention of a jury unless a jury is demanded in the complaint or answer.

HISTORY: Laws, 1973, ch. 400, § 2; Laws, 1981, ch. 471, § 38; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such

earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1992).

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final

Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-38-5. Preliminary hearing.

The clerk or justice issuing the writ may also, by a separate summons, require the parties to appear before him for a preliminary hearing to determine the rights of the parties to immediate possession of the property involved, at a time and place fixed in the summons, but shall allow the defendant not less than two (2) days' notice. At the preliminary hearing the clerk or justice shall determine whether the temporary possession of the property is to be delivered to the plaintiff, retained by the defendant, or whether the proper officer shall seize and hold the property until a hearing on the merits to determine what bond, if any, should be required. An appropriate writ shall thereupon be issued for the enforcement of the temporary order. Upon written demand of either party the clerk, when the action is before a clerk of the court, shall refer the action for such preliminary hearing before any justice of the county or the judge of the court from which the process was issued. If temporary possession be granted to the plaintiff, the bond shall be for double the value of the property, and if temporary possession be granted to the defendant and bond be required, it shall be for not less than double the value of the plaintiff's interest therein.

Preliminary hearings may be determined by the justice or judge designated without regard to jurisdictional amount.

HISTORY: Laws, 1973, ch. 400, §§ 3, 5, eff from and after passage (approved March 28, 1973).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final

Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-38-7. Answer; judgment.

The defendant, or any interested person, may contest the demand of the plaintiff on or before the return day of the writ by filing an answer in writing, under oath, of his claim or defense, itemizing his account, if any, and the case shall be then at issue between the parties, and shall be tried as other cases in the court. The judgment or judgments of the court shall adjudicate and adjust the rights of the several parties as to the subject matter of the suit, and costs may be adjudged accordingly.

HISTORY: Laws, 1973, ch. 400, § 4, eff from and after passage (approved March 28, 1973).

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the last sentence. The word “cost” was changed to “costs.” The Joint Committee ratified the correction at its December 3, 1996 meeting.

Cross References — Filing and service requirements for pleadings and motions in circuit courts, see URCCC 4.02.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final

Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-38-9. Claim and delivery cumulative and additional to other actions.

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

HISTORY: Laws, 1973, ch. 400, § 6, eff from and after passage (approved March 28, 1973).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Provisional and Final

Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

CHAPTER 39.
QUO WARRANTO

In General.	11-39-1
Trial of Right to Public Office in Vacation.	11-39-51

IN GENERAL

Sec.	
11-39-1.	To what cases applicable.
11-39-3.	Proceedings.
11-39-5.	Trial of right to office.
11-39-7.	Form of complaint against corporation.
11-39-9.	Form of complaint against individuals.
11-39-11.	Repealed.
11-39-13.	Summons.
11-39-15.	Court or judge may make certain orders.
11-39-17.	Repealed.
11-39-19.	Judgments against defendants.
11-39-21.	Disobedience punishable.
11-39-23.	Private person relator, liable for costs.
11-39-25.	Trustees to be appointed.
11-39-27.	Bond of trustees.
11-39-29.	Property surrendered to trustees.
11-39-31.	Trustees to return inventory to chancery court—vacancies filled—new bonds.
11-39-33.	Sales of property—proceedings—trustees not to buy.
11-39-35.	Claims presented and audited—notice.
11-39-37.	Compensation of trustees and others.
11-39-39.	Report of trustees, and order of paying debts.

§ 11-39-1. To what cases applicable.

The remedy by information in the nature of a quo warranto shall lie, in the name of the state, against any person or corporation offending in the following cases, viz.:

First. — Whenever any person unlawfully holds or exercises the functions of any public office, civil or military, or franchise, or any office in any corporation, city, town, or village, and to try the right to any such office.

Second. — Whenever any public officer has done or suffered to be done, or has omitted to do any act, the doing or omission of which works a forfeiture of office.

Third. — Whenever any two or more persons shall act as a corporation, or assume so to do without being legally incorporated.

Fourth. — Whenever any corporation shall be guilty of a misuser or abuse of its powers, or ceases to discharge the duty for which it was created.

Fifth. — Whenever any corporation willfully exercises powers not conferred by law.

Sixth. — Whenever any corporation fails to exercise powers conferred

by law and essential to its corporate existence, or implied in its duty to the public.

Seventh. — Whenever any corporation shall be guilty of doing or neglecting to do any act the doing or neglecting of which is made by law a cause of forfeiture of franchise.

Eighth. — Whenever any corporation shall willfully and persistently violate the law made for regulating such corporations, or the criminal law; but acts done in good faith before adjudication of the constitutionality of a doubtful statute shall not be cause of forfeiture.

Ninth. — Whenever it is sought to have the right of any corporation, not created by the laws of this state, to do business in this state forfeited because of its persistent refusal to comply with the laws thereof.

Tenth. — Whenever any nonresident alien or corporation shall acquire or hold lands contrary to law.

HISTORY: Codes, 1857, ch. 35, art. 12; 1871, § 1490; 1880, §§ 2585, 2586, 2587; 1892, § 3520; 1906, § 4017; Hemingway's 1917, § 3012; 1930, § 3053; 1942, § 1120.

Cross References — Subject-matter jurisdiction of circuit courts generally, see § 9-7-81.

Quo warranto proceedings against municipal marshal or chief of police, see § 21-21-1.

Vacancy in office due to removal or default of officer, see §§ 25-5-1, 25-1-59.

Filling vacancy in office resulting from failure of official to qualify for office, see § 25-1-7.

Proceedings against motor vehicle manufacturers for cancellation of dealer agency contract, see § 63-17-137.

Proceedings against fraternal society, see § 83-29-45.

Proceedings to forfeit charter of club violating liquor laws, see § 99-27-25.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. To determine right to office.
2. To corporation or persons assuming to act as such.
3. Miscellaneous.

1. To determine right to office.

In public quo warranto action, respondent has burden of proving his entitlement to public office against challenge from state by either district attorney or attorney general. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Private quo warranto action is required to be brought on behalf of state by person

claiming entitlement to office which puts burden on plaintiff to establish entitlement to office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Relator in private writ of quo warranto must stand on strength of his entitlement to office as opposed to weaknesses of person alleged as not properly holding office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

In comparison to public writ, person need not have private petition for writ of quo warranto filed by attorney general or

district attorney so long as it is filed in name of state on relation of another who is seeking their right to office against person who has held over in office when petitioner has been elected to said office. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Voter bringing quo warranto action had incorrectly filed private rather than public action and did not have standing to file public action to contest candidate's qualifications for chancellor's office, as publication had to be filed by attorney general or district attorney. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Even if private action, rather than public action, for quo warranto had been proper to challenge qualifications of candidate for chancellor's office, voter did not have standing to bring private action as voter did not claim entitlement to chancellor position. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

As elected chancellor had not yet taken office and was not in possession of or exercising any function of office of chancellor at time of private action of quo warranto challenging his qualifications, claim was not ripe for private action of quo warranto. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

A chancery clerk was entitled to bring an original action in the circuit court, in the nature of quo warranto, under §§ 11-39-1 and 11-39-5 as supplanted by the rules of civil procedure, for reinstatement by the county board of supervisors to the posts of clerk of the board of supervisors and county auditor. Barlow v. Weathersby, 597 So. 2d 1288, 1992 Miss. LEXIS 196 (Miss. 1992).

A private person may bring a petition, on information in quo warranto, to try the

right of an office in the name of the State of Mississippi, and such is the proper remedy to contest the qualifications of a successful candidate to hold the office. State ex rel. Muirhead v. State Board of Election Comm'rs, 259 So. 2d 698, 1972 Miss. LEXIS 1543 (Miss.), cert. denied, 409 U.S. 851, 93 S. Ct. 64, 34 L. Ed. 2d 94, 1972 U.S. LEXIS 1351 (U.S. 1972).

Generally, a bill for injunction will not lie to try the right and title to a public office, but the proper remedy is by quo warranto. Lacey v. Noblin, 238 Miss. 329, 118 So. 2d 336, 1960 Miss. LEXIS 409 (Miss. 1960).

One of the functions of a writ of quo warranto at common law and under the statute is to serve as an appropriate and adequate means for determination of the right or title to a public office, and to oust an incumbent who was unlawfully holding the office. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764, 1957 Miss. LEXIS 537 (Miss.), aff'd, 231 Miss. 529, 96 So. 2d 828, 1957 Miss. LEXIS 538 (Miss. 1957).

Although the writ of quo warranto is not a writ of right, but issues in the sound discretion of the court, where the judgment of the circuit court was not placed upon the discretionary exercise of power in denial of the writ but was based upon the erroneous premise that § 9, chapter 10 of the Laws of 1953 (§ 6271-09) was unconstitutional, and the defendant, who was serving as County Superintendent of Public Education did not comply with the requirements of the statute, the Supreme Court, upon determining that the statute was constitutional, was under the duty to enforce the act and issue the writ of quo warranto, finding that the defendant had been exercising the functions of office without authority and removing him therefrom. State ex rel. Patterson v. Land, 231 Miss. 529, 95 So. 2d 764, 1957 Miss. LEXIS 537 (Miss.), aff'd, 231 Miss. 529, 96 So. 2d 828, 1957 Miss. LEXIS 538 (Miss. 1957).

In a quo warranto proceeding filed by the Attorney General of the state against defendant, who was serving as County Superintendent of Public Education, on the ground that he was unlawfully holding and exercising that public office, and

for the purpose of trying his right to that office, since the defendant was impelled to show a right *de jure* and not one merely *de facto*, it was incumbent upon him to show a good legal title and not merely a colorable one, and he must rely wholly on the strength of his own title. *State ex rel. Patterson v. Land*, 231 Miss. 529, 95 So. 2d 764, 1957 Miss. LEXIS 537 (Miss.), *aff'd*, 231 Miss. 529, 96 So. 2d 828, 1957 Miss. LEXIS 538 (Miss. 1957).

A petition in the nature of quo warranto to oust one from office as trustee of a consolidated school which alleged that relator had been duly elected as trustee of the school and showing that there was no vacancy in the trusteeship such as would indicate the necessity of the superintendent of education to appoint the respondent as continuing trustee, stated a good cause of action. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339, 1952 Miss. LEXIS 598 (Miss. 1952).

Petition in the nature of quo warranto to oust one from office as trustee of consolidated school was properly filed in the name of the state on relation of another and not in the name of attorney general or a district attorney. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339, 1952 Miss. LEXIS 598 (Miss. 1952).

In quo warranto proceedings to try title to public office where State is relator, instead of another individual claimant of the office, the burden is on respondent to prove his right or title to the office, hence there was no error by a trial court in refusing an instruction which sought to place burden of proof on relator. *Jones v. State*, 207 Miss. 208, 42 So. 2d 123, 1949 Miss. LEXIS 330 (Miss. 1949).

Town marshal held properly removed from office as result of quo warranto proceedings, where he failed to show resident in town as required by §§ 241, 250 of Constitution, and Code of 1942, § 3762. *Jones v. State*, 207 Miss. 208, 42 So. 2d 123, 1949 Miss. LEXIS 330 (Miss. 1949).

In order to maintain a proceeding in the nature of quo warranto to try the right to a public office, it must appear that the respondent is in actual possession and use of the office in question; it is not sufficient for the information to show that the respondent lay some claim to the office with-

out usurping the functions thereof. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722, 1941 Miss. LEXIS 70 (Miss. 1941).

One legally elected to fill a vacancy in a public office, making the required bond and taking the oath of office required, is not entitled to a judgment of the court awarding him the possession of the office unless there is someone holding the office not entitled so to do. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722, 1941 Miss. LEXIS 70 (Miss. 1941).

Neither of two candidates claiming to have been elected to a public office, which is vacant, has a right to resort to quo warranto. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722, 1941 Miss. LEXIS 70 (Miss. 1941).

One claiming to be entitled to the office of a member of a county board of supervisors because of the failure of another elected to the office to make bond and take the oath of office and by reason of having received the next highest number of votes at such election could not maintain a proceeding in the nature of quo warranto to establish his right to possession thereof where the respondent was not in possession of such office and the office was vacant. *O'Neal v. Fairley*, 190 Miss. 650, 200 So. 722, 1941 Miss. LEXIS 70 (Miss. 1941).

A proper remedy to contest the qualifications to hold office of one nominated in a party primary is by quo warranto after the general election. *McKenzie v. Thompson*, 186 Miss. 524, 191 So. 487, 1939 Miss. LEXIS 260 (Miss. 1939).

One who contested the election of another to a municipal office because of his illegal nomination in the primary, who made no claim to have been elected himself, was not entitled to contest the election, the proper remedy in such case being quo warranto, since the question is a public and not a private one. *Omar v. West*, 186 Miss. 136, 188 So. 917, 1939 Miss. LEXIS 196 (Miss. 1939).

An action contesting an election of a candidate for a municipal office by one who himself made no claim to have been elected to a certain office and who was not entitled under Code 1930, § 6258 to bring an action, his remedy being by quo warranto, could not be treated as a quo war-

ranto proceeding because it was not in the name of the state as required. *Omar v. West*, 186 Miss. 136, 188 So. 917, 1939 Miss. LEXIS 196 (Miss. 1939).

Proceeding to try right to office of councilman instituted in name of State on relation of claimant is in the nature of a private action, in which claimant must succeed on strength of his own claim. *State ex rel. Parks v. Tucei*, 175 Miss. 218, 166 So. 370, 1936 Miss. LEXIS 20 (Miss. 1936).

State could not debar city officers from exercising jurisdiction over annexed territory where annexation proceedings were void, but city, as constituted, had functioned nearly seven years and annexed municipality had been abolished by statute. *State ex rel. Jordan v. Mayor & Comm'rs of Greenwood*, 157 Miss. 875, 129 So. 682 (Miss. 1930).

Quo warranto is proper to test the validity of the formation of a county under a legislative act providing therefor. *State ex rel. Collins v. Jackson*, 119 Miss. 727, 81 So. 1, 1919 Miss. LEXIS 13 (Miss. 1919).

A person unlawfully acting as clerk of the board of trustees of the penitentiary exercises the functions of a public officer, and may be proceeded against by quo warranto. *Yerger v. State*, 91 Miss. 802, 45 So. 849, 1907 Miss. LEXIS 196 (Miss. 1907).

A trusteeship of a public school is an office within this provision [Code 1942, § 1120]. *Ellis v. Greaves*, 82 Miss. 36, 34 So. 81, 1903 Miss. LEXIS 135 (Miss. 1903).

A quo warranto proceeding must fail if it appears that the relator at the time of his election and institution of the suit not being registered was not a qualified elector of the state, and therefore under § 250 Const 1890, not eligible to office. *Andrews v. State*, 69 Miss. 740, 13 So. 853, 1892 Miss. LEXIS 50 (Miss. 1892).

Where an officer fails to qualify under newly imposed conditions, quo warranto is an appropriate remedy to remove him. *Hyde v. State*, 52 Miss. 665, 1876 Miss. LEXIS 272 (Miss. 1876).

2. To corporation or persons assuming to act as such.

If trustees could not operate railroad, state's remedy was by quo warranto not

anti-trust law proceedings. *State ex rel. Knox v. Edward Hines Lumber Co.*, 150 Miss. 1, 115 So. 598, 1928 Miss. LEXIS 101 (Miss. 1928).

Quo warranto is the proper remedy where a corporation practiced fraud in obtaining its charter and its acts under the charter have been all in violation of law. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258, 1917 Miss. LEXIS 205 (Miss. 1917).

That a corporation has so conducted its affairs as to subject it to a quo warranto by the state does not prevent its recovery in an action of unlawful detainer against a private person. *Home Mut. Bldg. & Loan Ass'n v. Leonard*, 77 Miss. 39, 25 So. 351, 1899 Miss. LEXIS 47 (Miss. 1899).

Where a charter is repealed, and the performance of its function is made criminal, it is no objection to a prosecution that the franchise was not forfeited by a quo warranto proceeding. *Moore v. State*, 48 Miss. 147, 1873 Miss. LEXIS 43 (Miss. 1873), writ of error dismissed, 88 U.S. 636, 22 L. Ed. 653, 1874 U.S. LEXIS 1397 (U.S. 1875).

3. Miscellaneous.

Quo warranto writ under statute, being form of action, was interred with adoption of Mississippi Rules of Civil Procedure. *Dye v. State*, 507 So. 2d 332, 1987 Miss. LEXIS 2507 (Miss. 1987).

Unless and until the state courts of Mississippi have been given the opportunity to pass upon a quo warranto action brought by the State of Mississippi against a non-profit, non-share corporation seeking forfeiture of its corporate franchises and privileges on the ground that it has exceeded its corporate powers, the action was prematurely sought to be removed to the federal courts. *Williams v. Tri-County Community Center*, 323 F. Supp. 286, 1971 U.S. Dist. LEXIS 14935 (S.D. Miss.), *aff'd*, 452 F.2d 221, 1971 U.S. App. LEXIS 6768 (5th Cir. Miss. 1971).

In proceeding to remove district supervisor, court dismissing case improperly taxed costs against individuals, named as relators, having no interest other than that common to all citizens. *State v. Henderson*, 166 Miss. 530, 146 So. 456, 1933 Miss. LEXIS 347 (Miss. 1933).

Where a demurrer to the petition is sustained and an appeal is taken, the Supreme Court cannot consider matters resting on facts not appearing in the peti-

tion. *State ex rel. Baker v. Nichols*, 106 Miss. 419, 63 So. 1025, 1913 Miss. LEXIS 148 (Miss. 1913).

RESEARCH REFERENCES

ALR.

Right of private person not claiming office to maintain quo warranto proceedings to test title to or existence of office. 51 A.L.R.2d 1306.

CJS.

74 C.J.S., Quo Warranto §§ 8-30.

Am. Jur.

65 Am. Jur. 2d, Quo Warranto §§ 12-40.

§ 11-39-3. Proceedings.

The proceedings in the cases set forth in Section 11-39-1 shall be by complaint, in the name of the state, by the Attorney General or a district attorney, on his own motion or on relation of another, and, in a case to try the right to an office, on the relation of the claimant thereof. The complaint shall be filed in the circuit court of the county of the residence of the defendant; or, in the case of an officer, where he acts as such; or, in case of a corporation or pretended corporation, where its principal office or place of business may be or where it may transact any business and has an agent; or, in case of an alien or corporation acquiring or holding land contrary to law, where any of the land is situated.

HISTORY: Codes, 1857, ch. 35, art. 12; 1871 §§ 1490, 1491; 1880, §§ 2585, 2587; 1892, § 3521; 1906, § 4018; *Hemingway's* 1917, § 3013; 1930, § 3054; 1942, § 1121; Laws, 1991, ch. 573, § 73, eff from and after July 1, 1991.

Cross References — Suits by the attorney general generally, see § 7-5-37.

Subject-matter of circuit courts generally, see § 9-7-81.

Duty of district attorney to appear in court and prosecute generally, see § 25-31-11.

Prohibition against nonresident alien purchasing public land, see § 29-1-75.

Acquisition and holding of land by aliens generally, see § 89-1-23.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Who may institute action.
3. Jurisdiction and venue.

1. In general.

In public quo warranto action, respondent has burden of proving his entitlement to public office against challenge

from state by either district attorney or attorney general. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Private quo warranto action is required to be brought on behalf of state by person claiming entitlement to office which puts burden on plaintiff to establish entitle-

ment to office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Relator in private writ of quo warranto must stand on strength of his entitlement to office as opposed to weaknesses of person alleged as not properly holding office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

The persons in this section [Code 1942, § 1121] "on relation of another" refer to a person at whose instance and for whose benefit the proceeding is instituted. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339, 1952 Miss. LEXIS 598 (Miss. 1952).

A petition in the nature of quo warranto to oust one from office as trustee of a consolidated school which alleged that relator had been duly elected as trustee of the school and showing that there was no vacancy in the trusteeship such as would indicate the necessity of the superintendent of education to appoint the respondent as continuing trustee, stated a good cause of action. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339, 1952 Miss. LEXIS 598 (Miss. 1952).

This section [Code 1942, § 1121] should be given that construction, if possible, which will preserve the essentials of harmony and consistency in the judicial system. *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

Proceeding to try right to office of councilman instituted in name of State on relation of claimant is in the nature of a private action, in which claimant must succeed on strength of his own claim. *State ex rel. Parks v. Tucei*, 175 Miss. 218, 166 So. 370, 1936 Miss. LEXIS 20 (Miss. 1936).

Words "on relation of another," in quo warranto statute, refer to person at whose instance and for whose benefit proceeding is instituted. *State v. Henderson*, 166 Miss. 530, 146 So. 456, 1933 Miss. LEXIS 347 (Miss. 1933).

Demurrer to an information in quo warranto admits all the allegations contained

in the information, and the appellate court should assume that the allegations are true as stated. *State ex rel. Collins v. Senatobia Blank Book & Stationery Co.*, 115 Miss. 254, 76 So. 258, 1917 Miss. LEXIS 205 (Miss. 1917).

2. Who may institute action.

In comparison to public writ, person need not have private petition for writ of quo warranto filed by attorney general or district attorney so long as it is filed in name of state on relation of another who is seeking their right to office against person who has held over in office when petitioner has been elected to said office. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Voter bringing quo warranto action had incorrectly filed private rather than public action and did not have standing to file public action to contest candidate's qualifications for chancellor's office, as publication had to be filed by attorney general or district attorney. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Even if private action, rather than public action, for quo warranto had been proper to challenge qualifications of candidate for chancellor's office, voter did not have standing to bring private action as voter did not claim entitlement to chancellor position. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Where relators have no claim to the office, the right to which they seek to attack in a quo warranto proceeding, a demurrer was properly sustained to their petition. *State ex rel. Powe v. Pittman*, 253 Miss. 844, 179 So. 2d 563, 1965 Miss. LEXIS 1060 (Miss. 1965).

Petition in the nature of quo warranto to oust one from office as trustee of consolidated school was properly filed in the name of the state on relation of another and not in the name of attorney general or

a district attorney. *State ex rel. Funches v. Keys*, 215 Miss. 562, 61 So. 2d 339, 1952 Miss. LEXIS 598 (Miss. 1952).

Attorney general alone has right to institute suit for quo warranto to forfeit corporate charter or corporate right where relief prayed for is to forfeit such charter or right throughout the state; the district attorney may bring such a suit only when the corporation is authorized by its charter to exercise its functions only in certain county or judicial district of the state, or where its charter powers are such that, because of the essential manner of the exercise thereof, or because of exclusive physical conditions or situations or the like, those powers cannot be exercised except in a certain territorial location in the state, so that its ouster in that territory could not be of any real interest to other sections of the state. *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

Incapacity of district attorney to institute quo warranto on behalf of the state in matters of state-wide interest is a defect which goes to the very power and jurisdiction of the court to act at all in the premises, and therefore it is immaterial whether the defect is specifically challenged by demurrer. *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

It is not within the province of the trial court to limit the scope of its judgment in quo warranto proceedings on account of the fact that the state had purported to appear through one legal representative (district attorney) rather than another (attorney general). *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

State is not bound by appearance in court on its behalf by an unauthorized official to any greater extent than an individual would be bound by the act of a person assuming to sue on his behalf without authority. *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

Quo warranto proceedings brought by an unauthorized officer on behalf of the

state should be dismissed without prejudice to right of the state to sue by its proper officer. *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

Ousting of a theater corporation, authorized to do business throughout the state, from the exercise of its rights and franchises anywhere in the state is a subject of state-wide interest, for which quo warranto may be brought only by the attorney general and not by a district attorney, although the particular ground of ouster is the violation of the Sunday law by theaters operated by the corporation within the district, and this is true even though this section [Code 1942, § 1121] expressly provides that quo warranto may be "by the attorney general or a district attorney," since this is not to be so construed as to disrupt the natural division of authority between the attorney general and district attorneys, under which the former takes care of state matters and the latter take care of local matters, especially in view of the confusion which would necessarily follow from leaving matters of state interest in the hands of the various district attorneys. *Kennington-Saenger Theatres, Inc. v. State*, 196 Miss. 841, 18 So. 2d 483, 1944 Miss. LEXIS 263 (Miss. 1944).

Under this section [Code 1942, § 1121] a municipality which created the office may be the relator in a quo warranto proceeding instituted by the district attorney to oust an intruder who has usurped the office of policeman. *Beverly v. Hattiesburg*, 83 Miss. 621, 36 So. 74, 1903 Miss. LEXIS 81 (Miss. 1903).

3. Jurisdiction and venue.

Circuit Court had jurisdiction to decide suit challenging powers being exercised by Lieutenant Governor where there was no exclusive vesting in another court of jurisdiction to hear and decide such claim, and due to nature of relief sought, i.e., that Lieutenant Governor's exercise of certain powers in Senate be declared unconstitutional and he be debarred from exercising such authority, such case was akin to those historically within circuit court jurisdiction, to-wit: quo warranto

proceedings. *Dye v. State*, 507 So. 2d 332, 1987 Miss. LEXIS 2507 (Miss. 1987).

Equity court held without jurisdiction to try, by injunction, right to office of county supervisor. *Yates v. Summers*, 177 Miss. 252, 170 So. 827, 1936 Miss. LEXIS 259 (Miss. 1936).

Suit to forfeit charter of domestic corporation must be brought in county of its domicile or in which it has a fixed place of business. *Most Worshipful Cuney Grand Lodge A. F. & A. M. v. Knox*, 144 Miss. 628, 109 So. 866, 1926 Miss. LEXIS 373 (Miss. 1926).

Where the board of election commissioners in a county having two judicial districts are in the habit of meeting at the courthouse in the second district for the performance of their duties, quo warranto proceedings may be instituted in that district, though the defendant resides in the other judicial district of the county. *State*

ex rel. Fontaine v. Anderson, 133 Miss. 533, 97 So. 884, 1923 Miss. LEXIS 162 (Miss. 1923).

The information in quo warranto against an alleged officer should be filed in the circuit court of the county where the duties of the office are performed. *State ex rel. Fontaine v. Anderson*, 133 Miss. 533, 97 So. 884, 1923 Miss. LEXIS 162 (Miss. 1923).

A quo warranto proceeding instituted by the state on the relation of the attorney-general, under § 4 of the act of March 12, 1900 (Laws 1900 p. 125), to forfeit the charter of a corporation belonging to a trust, is a civil and not a criminal proceeding, and the venue of such a suit is regulated by this section [Code 1942, § 1121]. *State ex rel. Attorney Gen. v. Mississippi Cotton Oil Co.*, 79 Miss. 203, 30 So. 609, 1901 Miss. LEXIS 38 (Miss. 1901).

OPINIONS OF THE ATTORNEY GENERAL

The Attorney General, the District Attorney, and the person who claims the right to a particular office are authorized to bring quo warranto against the incumbent. *Ops. Atty. Gen. 1931-33*, p. 51.

When there are two contestants for an office, and one of them is in possession of such office, then the other contestant can, and should, institute the necessary legal proceedings to try his rights to the office. *Ops. Atty. Gen. 1931-33*, p. 51.

When it is alleged that a county or county district officer is ineligible, disqualified, or for any reason is holding said office unlawfully, then it is the paramount duty of the District Attorney of the district where the person is located to make the necessary investigation and if in his judgment the facts warrant that proceedings be instituted to oust such officer, then such District Attorney should proceed to do so. *Ops. Atty. Gen. 1931-33*, p. 51.

In the event such proceeding is taken and an appeal is prosecuted by either

party to the Supreme Court, then the Attorney General would represent the State in the Supreme Court. *Ops. Atty. Gen. 1931-33*, p. 51.

In the event such allegation is made against a state or state district officer, then it is the paramount duty of the Attorney General to make the necessary investigation and institute the proper proceedings. *Ops. Atty. Gen. 1931-33*, p. 51.

The law authorizes the Attorney General, as well as the District Attorneys to proceed in all cases. However, it was not contemplated by the Legislature that the Attorney General would institute the proceedings against county or county district officers. This is especially true when ouster is sought on some technical ineligibility to the person in office. *Ops. Atty. Gen. 1931-33*, p. 51.

It is in exceptional cases only that the Attorney General will interfere in reference to county and county district officers. *Ops. Atty. Gen. 1931-33*, p. 51.

RESEARCH REFERENCES

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Propriety of default judgment against

defendant, without introduction of evidence, in quo warranto proceeding. 92

A.L.R.2d 1121.

Jur. Pl & Pr Forms, Quo Warranto, Forms 16:1011-16:1031.

Am. Jur.

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Complaints and informations, 21 Am. Jur. Pl & Pr Forms (Rev), Quo Warranto, Forms 41 et seq.

Complaints and information, 16 Am.

CJS.

74 C.J.S., Quo Warranto §§ 47-57.

Law Reviews.

1987 Mississippi Supreme Court Review, Civil Procedure. 57 Miss. L. J. 443, August, 1987.

§ 11-39-5. Trial of right to office.

In case the proceedings be on the relation of a person claiming to be entitled to an office, the ground of his claim shall be stated by proper averment, and judgment shall be rendered according to the rights of the respective claimants; and, if it be in favor of the relator, he shall be entitled to the office on qualifying according to law, and may recover of the defendant in an action all damages that may have accrued in consequence of withholding the office from him.

HISTORY: Codes, 1857, ch. 35, art. 18; 1871, § 1497; 1880, § 2587; 1892, § 3522; 1906, § 4019; Hemingway's 1917, § 3014; 1930, § 3055; 1942, § 1122.

Cross References — Trial of right to office in vacation, see §§ 11-39-51 to 11-39-61. Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Who may institute action.

1. In general.

In public quo warranto action, respondent has burden of proving his entitlement to public office against challenge from state by either district attorney or attorney general. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Private quo warranto action is required to be brought on behalf of state by person claiming entitlement to office which puts burden on plaintiff to establish entitlement to office. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Relator in private writ of quo warranto

must stand on strength of his entitlement to office as opposed to weaknesses of person alleged as not properly holding office. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

2. Who may institute action.

In comparison to public writ, person need not have private petition for writ of quo warranto filed by attorney general or district attorney so long as it is filed in name of state on relation of another who is seeking their right to office against person who has held over in office when petitioner has been elected to said office. State ex rel. Holmes v. Griffin, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Voter bringing quo warranto action had incorrectly filed private rather than public

action and did not have standing to file public action to contest candidate's qualifications for chancellor's office, as publication had to be filed by attorney general or district attorney. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

Even if private action, rather than public action, for quo warranto had been proper to challenge qualifications of candidate for chancellor's office, voter did not have standing to bring private action as voter did not claim entitlement to chancellor position. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

As elected chancellor had not yet taken office and was not in possession of or exercising any function of office of chancellor at time of private action of quo warranto challenging his qualifications, claim was not ripe for private action of quo warranto. *State ex rel. Holmes v. Griffin*, 667 So. 2d 1319, 1995 Miss. LEXIS 610 (Miss. 1995), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 22, 1996 U.S. LEXIS 4695 (U.S. 1996).

A chancery clerk was entitled to bring an original action in the circuit court, in the nature of quo warranto, under §§ 11-39-1 and 11-39-5 as supplanted by the rules of civil procedure, for reinstatement by the county board of supervisors to the posts of clerk of the board of supervisors and county auditor. *Barlow v. Weathersby*, 597 So. 2d 1288, 1992 Miss. LEXIS 196 (Miss. 1992).

In quo warranto proceedings to try title to public office where State is relator, instead of another individual claimant of the office, the burden is on respondent to prove his right or title to the office, hence there was no error by a trial court in refusing an instruction which sought to place burden of proof on relator in the instant case. *Jones v. State*, 207 Miss. 208, 42 So. 2d 123, 1949 Miss. LEXIS 330 (Miss. 1949).

Town marshal held properly removed from office as result of quo warranto proceedings, where he failed to show resi-

dence in town as required by §§ 241, 250 of Constitution, and Code of 1942 § 3762. *Jones v. State*, 207 Miss. 208, 42 So. 2d 123, 1949 Miss. LEXIS 330 (Miss. 1949).

Equity court held without jurisdiction to try, by injunction, right to office of county supervisor. *Yates v. Summers*, 177 Miss. 252, 170 So. 827, 1936 Miss. LEXIS 259 (Miss. 1936).

Appointment of the defendants to the offices of aldermen and members of the board of school trustees by the governor, and the performance of the duties, constituted them "de facto officers," and the only remedy for complainants claiming title to the offices is by quo warranto. *Town of Sumner v. Henderson*, 116 Miss. 64, 76 So. 829, 1917 Miss. LEXIS 296 (Miss. 1917).

In an action of quo warranto to decide which of two persons received a majority of the legal votes cast at election after plaintiff's evidence is closed, defendant is entitled to amend his pleadings and offer evidence to show that votes were cast for the relator by persons who were not qualified electors. *Kelly v. State*, 79 Miss. 168, 30 So. 49, 1901 Miss. LEXIS 31 (Miss. 1901) but see *Wade v. Williams*, 517 So. 2d 573, 1987 Miss. LEXIS 2971 (Miss. 1987).

A quo warranto proceeding cannot be heard by a special judge under appointment by the governor, as Code 1892, § 922, providing for the appointment of special judges, does not apply. *Kelly v. State*, 79 Miss. 168, 30 So. 49, 1901 Miss. LEXIS 31 (Miss. 1901) but see *Wade v. Williams*, 517 So. 2d 573, 1987 Miss. LEXIS 2971 (Miss. 1987).

An information which shows that the election officers had declared the defendant elected and that he had qualified and entered upon his duties, but questions his right to the office because of irregularities or illegalities in the election is demurrable if it does not aver the facts; the statement of the pleaders' conclusion is not sufficient. *Conner v. McLaurin*, 77 Miss. 373, 27 So. 594, 1899 Miss. LEXIS 79 (Miss. 1899).

It is unnecessary for a relator to have taken oath and executed bond or have offered to do so on or before the beginning of the term to maintain by quo warranto a contest for a municipal office with one usurping same. *State ex rel. Bourgeois v. Laizer*, 77 Miss. 146, 25 So. 153, 1899 Miss. LEXIS 44 (Miss. 1899).

RESEARCH REFERENCES

CJS.

74 C.J.S., Quo Warranto §§ 77, 78.

§ 11-39-7. Form of complaint against corporation.

For convenience and certainty, the complaint, if against a corporation, shall set out briefly the causes of forfeiture. It may be in the form following, to-wit:

“State of Mississippi, Circuit Court, _____ term,
County of _____. A.D. _____,

“The State of Mississippi, by A B, district attorney for the _____ judicial district of the state, of his own accord (or on the relation of C D, as the case may be) gives the court here to understand and be informed that the corporation of _____ has forfeited all right to exercise any of the franchises and privileges granted it in this, to-wit (set out the causes of forfeiture).

“Wherefore, the State of Mississippi, by said district attorney, prays judgment of forfeiture and ouster against said corporation.”

And in all other cases the complaint shall be in form substantially the same as near as may be, conforming to the state of case.

HISTORY: Codes, 1857, ch. 35, art. 15; 1871, § 1494; 1880, § 2588; 1892, § 3523; 1906, § 4020; Hemingway’s 1917, § 3015; 1930, § 3056; 1942, § 1123; Laws, 1991, ch. 573, § 74, eff from and after July 1, 1991.

§ 11-39-9. Form of complaint against individuals.

If the complaint be filed against persons exercising corporate franchises without authority, the following language may be used after the word “informed,” to-wit:

“That certain persons (naming them) have for _____ months last past used, and still do use, the following liberties and franchises without lawful authority, to-wit: (set out the franchises), which said franchises and privileges the said _____ have usurped, and still do usurp.

“Wherefore the State of Mississippi, by said district attorney, prays that they may be debarred of such rights.”

HISTORY: Codes, 1857, ch. 35, art. 17; 1871, § 1494; 1880, § 2590; 1892, § 3524; 1906, § 4021; Hemingway’s 1917, § 3016; 1930, § 3057; 1942, § 1124; Laws, 1991, ch. 573, § 75, eff from and after July 1, 1991.

§ 11-39-11. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 35, art. 16; 1871, § 1496; 1880, § 2589; 1892, § 3525; 1906, § 4022; Hemingway’s 1917, § 3017; 1930, § 3058; 1942, § 1125]

Editor’s Notes — Former § 11-39-11 related to defense to information in nature of quo warranto – how made.

§ 11-39-13. Summons.

After the complaint has been filed, summons shall be issued as required by the Mississippi Rules of Civil Procedure.

HISTORY: Codes 1857, ch. 35, art. 13; 1871, § 1495; 1880, § 2591; 1892, § 3526; 1906, § 4023; Hemingway's 1917, § 3018; 1930, § 3059; 1942, § 1126; Laws, 1991, ch. 573, § 76, eff from and after July 1, 1991.

Cross References — Duty of sheriff to keep process docket, see § 19-25-59. Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quo Warranto § 43.
21 Am. Jur. Pl & Pr Forms (Rev), Quo Warranto, Form 30 (summons in quo warranto).

CJS.

74 C.J.S., Quo Warranto § 35.

§ 11-39-15. Court or judge may make certain orders.

During the pendency of the action, the court, or judge in vacation, may make all proper orders for preventing damage or injury to the plaintiff before the case is decided.

HISTORY: Codes, 1880, § 2598; 1892, § 3527; 1906, § 4024; Hemingway's 1917, § 3019; 1930, § 3060; 1942, § 1127.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-39-17. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 35, art. 14; 1871, § 1496; 1880, § 2592; 1892, § 3528; 1906, § 4025; Hemingway's 1917, § 3020; 1930, § 3061; 1942, § 1128]

Editor's Notes — Former § 11-39-17 related to nature of proceedings and trial term.

§ 11-39-19. Judgments against defendants.

If it be found on the trial of an information that a corporation has forfeited its charter, judgment of ouster from the franchises shall be given, and that it be dissolved; and if it be found, on trial, that persons claiming to exercise a franchise are not entitled to the same, the judgment shall be that such persons be debarred and excluded from the use of the franchise; and in both cases the state shall recover costs. If judgment be against the defendant, finding that he has been exercising the functions of an office without authority, he shall be removed from office and debarred therefrom, and shall pay costs.

The court shall order the defendant to deliver over all records, books, and

papers in his custody or under his control, belonging to the office, and may make and enforce all orders proper to carry its judgment into effect.

HISTORY: Codes, 1857, ch. 35, art. 19; 1871, §§ 1499, 1502; 1880, §§ 2593, 2594; 1892, § 3529; 1906, § 4026; Hemingway's 1917, § 3021; 1930, § 3062; 1942, § 1129.

Cross References — Cases in which appeals are returnable at any time, see § 11-3-3.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In proceeding to remove district supervisor, court dismissing case improperly taxed costs against individuals, named as

relators, having no interest other than that common to all citizens. *State v. Henderson*, 166 Miss. 530, 146 So. 456, 1933 Miss. LEXIS 347 (Miss. 1933).

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quo Warranto §§ 96 et seq.

Judgment of ouster, 21 Am. Jur. Pl & Pr Forms (Rev), Quo Warranto, Forms 81-83, 97, 115.

CJS.

74 C.J.S., Quo Warranto §§ 76-79.

§ 11-39-21. Disobedience punishable.

Any person who refuses or knowingly neglects to obey any order of the court made as herein provided, shall be guilty of contempt of court, and shall be fined in any sum not exceeding Five Thousand Dollars (\$5,000.00), and imprisoned in the county jail until he comply with the order. He shall be further liable for damages resulting to any person on account of his refusal to obey.

HISTORY: Codes, 1871, § 1515; 1880, § 2595; 1892, § 3530; 1906, § 4027; Hemingway's 1917, § 3022; 1930, § 3063; 1942, § 1130.

Cross References — Punishment of contempt by courts generally, see § 9-1-17.

§ 11-39-23. Private person relator, liable for costs.

When an information is upon the relation of a private individual, it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs as plaintiffs are responsible in other cases.

HISTORY: Codes, 1871, § 1504; 1880, § 2596; 1892, § 3531; 1906, § 4028; Hemingway's 1917, § 3023; 1930, § 3064; 1942, § 1131.

Cross References — Costs for trial in vacation, see § 11-39-61.

Liability of person for costs of suit brought in his name, see § 11-53-15.

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quo Warranto § 102.

CJS.

74 C.J.S., Quo Warranto § 80.

§ 11-39-25. Trustees to be appointed.

When judgment of forfeiture and ouster shall be rendered against any corporation or against any person pretending to exercise corporate franchises, the debtors to such corporation, or other body, shall not be thereby released from their debts and liabilities, and it shall be the duty of the judge of the court rendering the judgment to appoint one or more trustees to take charge of the books, evidences of debts, assets and property of such corporation or body pretending to exercise corporate franchises. Such trustees are invested with full power and authority to sue, in their own name, for and to collect all debts due to such corporation or body pretending to exercise corporate franchise, and to be sued in any court upon permission to sue being first obtained from the chancery court, and, generally, to maintain any action, or to revive or have revived against them any suit or judgment for or against such corporation or other body. The proceeds of debts collected and property sold shall be applied by such trustees to the payment of the costs in the quo warranto proceedings and in payment of debts, under the direction of the court.

HISTORY: Codes, 1857, ch. 35, art. 22; 1871, §§ 1506, 1609; 1880, § 2599; 1892, § 3532; 1906, § 4029; Hemingway's 1917, § 3024; 1930, § 3065; 1942, § 1132; Laws, 1908, ch. 193.

Cross References — Rules for appointment of receivers, see §§ 11-5-151 et seq.

Proceedings against trusts and combines for forfeiture of charter and right to do business, see §§ 75-21-19 to 75-21-23.

RESEARCH REFERENCES

Am. Jur.

65 Am. Jur. 2d, Quo Warranto § 99.

§ 11-39-27. Bond of trustees.

Before they enter upon the discharge of their duties, the trustees shall execute bond in such sum as may be prescribed, and with such sureties as may be approved by the judge, payable to the state, and conditioned for the faithful discharge of their duties as trustees, which bond may be put in suit for a breach thereof; and the amount collected thereon shall constitute a fund for the benefit of creditors or stockholders, as other funds of the corporation.

HISTORY: Codes, 1857, ch. 35, art. 23; 1871, §§ 1507, 1508; 1880, § 2600; 1892, § 3533; 1906, § 4030; Hemingway's 1917, § 3025; 1930, § 3066; 1942, § 1133.

RESEARCH REFERENCES

Am. Jur.

Bond or undertaking, 21 Am. Jur. Pl & Pr Forms (Rev), Replevin, Forms 13, 14.

§ 11-39-29. Property surrendered to trustees.

It shall be the duty of all persons having possession of property or evidences of debt belonging to any corporation, or persons pretending to exercise corporate franchises, against which or whom judgment of forfeiture shall have been rendered, to surrender and deliver the same to the trustees so appointed, and, in case of failure to do so, such trustees may maintain an action therefor.

HISTORY: Codes, 1857, ch. 35, art. 24; 1871, § 1510; 1880, § 2601; 1892, § 3534; 1906, § 4031; Hemingway's 1917, § 3026; 1930, § 3067; 1942, § 1134.

§ 11-39-31. Trustees to return inventory to chancery court—vacancies filled—new bonds.

It shall be the duty of the trustees, at the next succeeding term after their appointment of the chancery court of the county in which the quo warranto judgment was rendered, or at such other time as may be designated by the said chancery court or the chancellor, to return, under oath, to the court, a full and complete inventory of all evidences of debt, and property of every description, which may have come to their possession or knowledge as the property of the corporation or body pretending to exercise corporate franchises, and from time to time such further inventories as may be necessary, in case additional assets or property shall be discovered, which inventories shall be recorded by the clerk. The chancery court, or the chancellor in vacation, may remove trustees and appoint new ones, or fill vacancies in case of death or resignation, and may require new bonds of the trustees.

HISTORY: Codes, 1857, ch. 35, art. 25; 1871, § 1512; 1880, § 2602; 1892, § 3535; 1906, § 4032; Hemingway's 1917, § 3027; 1930, § 3068; 1942, § 1135.

§ 11-39-33. Sales of property—proceedings—trustees not to buy.

The chancery court, or chancellor in vacation, shall order the sale of the property, real and personal, in the same manner and on the same terms as such property of intestate decedents is sold, and like proceedings shall be had as far as applicable. It shall not be lawful for a trustee to become the purchaser of any property sold by him in that capacity, or by his cotrustees, either directly or indirectly, or to act as agent of any other person in making such purchase; and all purchases in violation of this provision shall be void.

HISTORY: Codes, 1857, ch. 35, arts. 22, 26; 1871, § 1511; 1880, §§ 2599, 2603; 1892, § 3536; 1906, § 4033; Hemingway's 1917, § 3028; 1930, § 3069; 1942, § 1136.

Cross References — Solability of property and franchise of corporation under judgment, see § 79-1-13.

§ 11-39-35. Claims presented and audited—notice.

The chancery court shall require all claims against the funds in the hands of the trustees to be presented and audited in such manner as shall be deemed proper. Notice shall be given to all persons holding such claims to present and have them audited in the same manner as such notice is given in the administration of estates, and all claims not presented and audited within twelve months after the last publication shall be forever barred.

HISTORY: Codes, 1880, § 2606; 1892, § 3537; 1906, § 4034; Hemingway's 1917, § 3029; 1930, § 3070; 1942, § 1137.

Cross References — Probate of claims, see § 91-7-149.

Procedural rules applicable to civil actions, see Mississippi Rules of Civil Procedure, Rule 1 et seq.

§ 11-39-37. Compensation of trustees and others.

The compensation of trustees and others shall be determined by the court, and allowed out of the effects of the corporation or other body, under the control of the court.

HISTORY: Codes, 1880, § 2605; 1892, § 3538; 1906, § 4035; Hemingway's 1917, § 3030; 1930, § 3071; 1942, § 1138.

§ 11-39-39. Report of trustees, and order of paying debts.

It shall be the duty of the trustees, at the first term of the court after the time for presenting claims has elapsed, to make a full and complete report of all claims presented and audited, at which time exception may be taken to the allowance or rejection of any claim, and, if sustained, the report may be corrected. When the report is settled, and the amount of indebtedness ascertained, the court shall order the trustees to pay the debts in the following order:

(a) The compensation to the trustees and others, and expenses incurred in settling the affairs of the corporation, including the payment of the costs in the quo warranto proceedings in the circuit court, and the costs in the chancery court.

(b) Debts due to the state or any county, city, town, or village for taxes or otherwise.

(c) A ratable distribution amongst creditors who have proved their claims, and had them allowed.

(d) The surplus, if any, shall be ratably distributed among the stockholders, according to their respective rights.

HISTORY: Codes, 1880, § 2606; 1892, § 3539; 1906, § 4036; Hemingway's 1917, § 3031; 1930, § 3072; 1942, § 1139.

TRIAL OF RIGHT TO PUBLIC OFFICE IN VACATION

Sec.

11-39-51. Right to public office triable in vacation.

11-39-53 through 11-39-57. Repealed.

11-39-59. Fees of officers, jurors, and witnesses.

11-39-61. Costs in such cases.

§ 11-39-51. Right to public office triable in vacation.

A proceeding by quo warranto to try the right to any public office, may be tried and determined in vacation as well as in term time.

HISTORY: Codes, 1880, § 2607; 1892, § 3540; 1906, § 4037; Hemingway's 1917, § 3032; 1930, § 3073; 1942, § 1140.

Cross References — Trial of right to office generally, see § 11-39-5.

JUDICIAL DECISIONS

1. In general.

A municipal office is a public office within the meaning of this section [Code 1942, § 1140]. *Kelly v. State*, 79 Miss. 168,

30 So. 49, 1901 Miss. LEXIS 31 (Miss. 1901) but see *Wade v. Williams*, 517 So. 2d 573, 1987 Miss. LEXIS 2971 (Miss. 1987).

§§ 11-39-53 through 11-39-57. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-39-53. [Codes, 1880, § 2608; 1892, § 3541; 1906, § 4038; Hemingway's 1917, § 3033; 1930, § 3074; 1942, § 1141]

§ 11-39-55. [Codes, 1880, § 2609; 1892, § 3542; 1906, § 4039; Hemingway's 1917, § 3034; 1930, § 3075; 1942, § 1142]

§ 11-39-57. [Codes, 1880, § 2610; 1892, § 3543; 1906, § 4040; Hemingway's 1917, § 3035; 1930, § 3076; 1942, § 1143]

Editor's Notes — Former § 11-39-53 related to how trial in vacation obtained.

Former § 11-39-55 related to record of proceedings — process to enforce judgment.

Former § 11-39-57 related to process for witnesses.

§ 11-39-59. Fees of officers, jurors, and witnesses.

The clerk, sheriff, jurors, and witnesses shall have the same allowance for attendance, to be taxed in the costs, as if their attendance was upon a circuit court, and shall be compellable to attend in like manner.

HISTORY: Codes, 1880, § 2611; 1892, § 3544; 1906, § 4041; Hemingway's 1917, § 3036; 1930, § 3077; 1942, § 1144.

Cross References — Fees for clerks of court generally, see §§ 25-7-9 to 25-7-13.

Fees for sheriffs and tax collectors generally, see §§ 25-7-19, 25-7-21.

Witnesses' fees generally, see § 25-7-47.

Jurors' fees generally, see § 25-7-61.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-39-61. Costs in such cases.

The judge, before making the order for trial in vacation or afterward, may impose such terms, and make such requirements as to costs and payment thereof or security therefor, as he thinks proper, and shall tax the costs of the case as he may deem just.

HISTORY: Codes, 1871, § 1504; 1880, § 2612; 1892, § 3545; 1906, § 4042; Hemingway's 1917, § 3037; 1930, § 3078; 1942, § 1145.

Cross References — Costs where information is upon relation of private individual, see § 11-39-61.

Liability for costs where suit is brought in name of state or person by another, see § 11-53-15.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Where a defendant by filing a crossaction or auxiliary action in the same case assumes the position of a complainant, he

may be required to post security for costs. *Martin v. McGraw*, 249 Miss. 334, 160 So. 2d 89, 161 So. 2d 784, 1964 Miss. LEXIS 530 (Miss. 1964).

CHAPTER 41.

MANDAMUS; PROHIBITION

Sec.

- 11-41-1. In what cases a remedy and how obtained.
- 11-41-3. Filing of complaint.
- 11-41-5 through 11-41-17. Repealed.
- 11-41-19. Mandamus in certain cases triable in vacation.
- 11-41-21. Repealed.

§ 11-41-1. In what cases a remedy and how obtained.

On the complaint of the state, by its Attorney General or a district attorney, in any matter affecting the public interest, or on the complaint of any private person who is interested, the judgment shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer, or person to do or not to do an act the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station, where there is not a plain, adequate, and speedy remedy in the ordinary course of law. All procedural aspects of this action shall be governed by the Mississippi Rules of Civil Procedure.

HISTORY: Codes, 1871, § 1517; 1880, § 2542; 1892, § 2846; 1906, § 3231; Hemingway's 1917, § 2533; 1930, § 2348; 1942, § 1109; Laws, 1991, ch. 573, § 77, eff from and after July 1, 1991.

Cross References — Issuance of remedial writs by judges of the supreme and circuit courts and chancellors, see § 9-1-19.

Compliance with provisions as to title to sixteenth section and lien lands, see § 29-3-9.

Enforcing orders of Tennessee river basin water pollution control commission, see § 49-17-71.

Enforcement of rights of bondholders of bridge and park commission, see § 55-7-51.

Mandamus proceedings in regard to agriculture and industry program bonds, see §§ 57-1-29, 57-3-21, 57-3-27.

Enforcement of county road sign provisions, see §§ 65-7-19, 65-7-21.

Enforcement of payment of toll bridge revenue bonds, see § 65-23-5.

Enforcement of rights of bondholders under Gulf of Mexico or Mississippi Sound project, see § 65-23-109.

Compelling county supervisors to comply with tick eradication statute, see § 69-15-315.

Enforcement of meat inspection law by mandamus, see § 75-35-315.

Enforcement of law as to dental service corporations, see § 83-43-31.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Application to supreme court for writ of mandamus to compel trial judge to render decision, see Miss. R. App. P. 15.

Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs, see Miss. R. App. P. 21.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Existence of other remedy.
3. Who may petition.
4. Propriety of remedy.
5. —Discretionary matters.
6. —Moot questions.
7. —Election matters.
8. —Payment of claims.
9. —Tax matters.
10. —Bond issues.
11. —School matters.
12. —Miscellaneous cases.
13. Defenses.
14. Judgment.
15. Injunction against issuance.
16. Miscellaneous.

1. In general.

Petitions for mandamus requesting that circuit clerk and justice court clerk be directed to accept in forma pauperis filings were not properly before Supreme Court; petitions should have been filed with circuit court. *Ivy v. State*, 688 So. 2d 223, 1997 Miss. LEXIS 5 (Miss. 1997).

Writ of prohibition is proper procedural vehicle to vest court with jurisdiction to address and settle question of whether alleged trade secrets were proper matters for discovery. *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 1987 Miss. LEXIS 2498 (Miss. 1987).

The writ of mandamus will not issue in every case even where there is a clear legal right, and where the circumstances make it unwise or inexpedient the court may refuse to issue the writ, especially when it is sought to enforce a private right. *Chatham v. Johnson*, 195 So. 2d 62, 1967 Miss. LEXIS 1425 (Miss. 1967).

Mandamus is a purely personal action. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

Writ of mandamus is a discretionary writ and even in a case where an absolute legal right is shown, writ will be withheld whenever public interest would be adversely affected. *Board of Sup'rs v. Mississippi State Highway Com.*, 207 Miss. 839, 42 So. 2d 802, 1949 Miss. LEXIS 394 (Miss. 1949).

Before a writ of mandamus may issue three essentials must exist: (1) a clear right in petitioner to relief sought, (2) a legal duty on part of defendant to do the thing which petitioner seeks to compel, and (3) there must be an absence of another adequate remedy at law. *Board of Sup'rs v. Mississippi State Highway Com.*, 207 Miss. 839, 42 So. 2d 802, 1949 Miss. LEXIS 394 (Miss. 1949).

Mandamus is a discretionary writ. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

A writ of mandamus will not be issued whenever public interest will be adversely affected, especially where only public political rights of those for whom petition is filed are asserted. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

The cause of action must exist at date of filing of petition for mandamus. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

The writ is never granted to take effect prospectively. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

A writ of mandamus will not issue unless there has been actual default in performance of duty. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

Demand for performance of act cannot be made before time has expired wherein officer is allowed to do the act. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

Mandamus would not issue, four months in advance of time for performance of duty, to compel secretary of state to disregard, in preparation of sample ballot, designations of candidates for Congress by districts on ground redistricting act was void. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

Writ of mandamus lies only to require performance of official duty which officer has refused to discharge. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476, 1931 Miss. LEXIS 281 (Miss. 1931).

Mandamus is an extraordinary writ, and not to be resorted to where the pur-

pose can otherwise reasonably be accomplished. *McHenry v. State*, 91 Miss. 562, 44 So. 831, 1907 Miss. LEXIS 155 (Miss. 1907).

2. Existence of other remedy.

Where, following the entry of an order refusing a building permit for the construction of a building which would in all respects conform to the applicable laws, ordinances, and regulations, the city authorities failed for some 60 days to sign or file a bill of exceptions, the result was an unreasonable and unwarranted delay in the issuance of the permit, effectively depriving the applicants of a plain, speedy, adequate remedy in the ordinary course of law; and a writ of mandamus was properly granted directing the issuance of the permit. *Thompson v. Mayfield*, 204 So. 2d 878, 1967 Miss. LEXIS 1227 (Miss. 1967).

A bill for mandatory injunction directing board of veterinary examiners to issue a license to practice veterinary medicine, surgery and dentistry was the proper remedy to obtain review of the board's order denying application for license, since there was no adequate remedy at law either by certiorari or mandamus. *Board of Veterinary Examiners v. Sistrunk*, 218 Miss. 342, 67 So. 2d 378, 1953 Miss. LEXIS 550 (Miss. 1953).

Where district attorney was serving three counties, he was not precluded from maintaining mandamus proceedings on behalf of one of such counties to compel motor vehicle comptroller to pay over certain funds to county out of gasoline tax collections in excess of the share which comptroller was willing to concede. *McCullen v. State*, 217 Miss. 256, 63 So. 2d 856, 1953 Miss. LEXIS 429 (Miss. 1953).

Right to appeal under Code 1942, §§ 1195, 1196, from refusal of board of supervisors to levy tax for school district, is not a "speedy remedy" within meaning of this section [Code 1942, § 1109], so as to bar issuance of writ of mandamus. *State ex rel. Chatham v. Bd. of Supervisors*, 209 Miss. 79, 46 So. 2d 73, 1950 Miss. LEXIS 363 (Miss. 1950).

Writ of mandamus should not be issued where there is plain, adequate and speedy remedy at law. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS

103 (Miss. 1938); *State by Coleman v. Cameron*, 223 Miss. 50, 77 So. 2d 716, 1955 Miss. LEXIS 351 (Miss. 1955); *Grenada County School Bd. v. Provine*, 224 Miss. 574, 80 So. 2d 798, 1955 Miss. LEXIS 523 (Miss. 1955).

Mandamus will not lie where there is adequate remedy by appeal. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287, 1930 Miss. LEXIS 43 (Miss. 1930).

3. Who may petition.

Resident and an association of concerned citizens lacked standing to pursue the remedy of mandamus because they did not show that they had any interest in a county landfill under the "any-private-person-who-is-interested" provision of Miss. Code Ann. § 11-41-1, separate from or in excess of that of the general population of the county. *Bennett v. Bd. of Supervisors*, 987 So. 2d 984, 2008 Miss. LEXIS 390 (Miss. 2008).

Trial court properly granted council members' petition for a writ of mandamus directing a reelected mayor to resubmit department directors for approval to the council pursuant to Miss. Code Ann. § 21-8-23(2) where the council members had standing to seek a writ; the council members demonstrated that, by virtue of their position as the legislative check and balance on the executive power of the mayor, they had a separate interest or an interest in excess of the general public. *DuPre v. Carroll*, 967 So. 2d 27, 2007 Miss. LEXIS 589 (Miss. 2007).

Appellate court affirmed the denial of the writ of mandamus sought by the citizens after the trial court dismissed their petition because the citizens clearly did not have standing to pursue a mandamus action under Miss. Code Ann. § 11-41-1, because the citizens admitted that they did not suffer an injury separate and apart from that suffered by other citizens. *Aldridge v. West*, 929 So. 2d 298, 2006 Miss. LEXIS 266 (Miss. 2006).

Governor, suing in his capacity as Governor and Administrator of Medicaid Division to preclude attorney general from proceeding with suit, did not meet statutory requirements for seeking mandamus, which may be sought by Attorney General or district attorney. *In re Fordice*, 691 So.

2d 429, 1997 Miss. LEXIS 104 (Miss. 1997).

A private person did not have standing to seek a writ of mandamus under § 11-41-1 where he testified that he had no interest separate from or in excess of that of the general public. *Jackson County School Bd. v. Osborn*, 605 So. 2d 731, 1992 Miss. LEXIS 313 (Miss. 1992).

Although the writs of mandamus and prohibition ordinarily may be sought only by the Attorney General or a district attorney, relief may be available to a private citizen if he can show "an interest separate from or in excess of that of the general public". *Fondren v. State Tax Com.*, 350 So. 2d 1329, 1977 Miss. LEXIS 2245 (Miss. 1977).

One state agency cannot obtain a writ of mandamus against another state agency in its own right. *Board of Education v. Sigler*, 208 So. 2d 890, 1968 Miss. LEXIS 1433 (Miss. 1968).

A petition for a writ of mandamus filed by a county board of education against the board of supervisors of that county to require the payment by the board of supervisors of funds earmarked for the use of the schools will be dismissed because the county board of education had no authority to compel the board of supervisors to act by issuance of a writ of mandamus. *Board of Education v. Sigler*, 208 So. 2d 890, 1968 Miss. LEXIS 1433 (Miss. 1968).

A taxpayer sustaining no injury other than is common to all taxpayers from a failure to back-assess and collect certain income taxes may not sue to compel the state tax commission to do so. *Stietenroth v. Monaghan*, 237 Miss. 305, 114 So. 2d 754, 1959 Miss. LEXIS 470 (Miss. 1959).

Where the statute provides that it shall be the duty of district attorney to appear in circuit court and prosecute for the state in his district all criminal prosecutions and civil cases in which the state or any county within his district may be interested, and where it also provides that if two or more counties are adversely interested, district attorney should not represent either, the statute is general and covers civil cases as a general class, whereas, a statute authorizing district attorney to petition for mandamus any

matter affecting public interest is specific and constitutes exception to the general provision. *McCullen v. State*, 217 Miss. 256, 63 So. 2d 856, 1953 Miss. LEXIS 429 (Miss. 1953).

Mandamus is regulated by statute, and, in matters affecting public interest, action must be brought on petition of state by its attorney general or a district attorney. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

Prerequisite to commencement of mandamus suit against commissioner of highway safety patrol to compel him to enforce laws of state applicable to transportation, possession and sale of intoxicating liquor, is petition either of attorney general or district attorney, and private citizen cannot assert that right for himself and general public. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

Right to bring a mandamus action on behalf of Hancock County, to compel the state highway commission to appraise and reimburse such county for its proportionate value of a bridge, connecting Hancock and Harrison Counties, which had been taken over by the commission, was not in the attorney general exclusively, but the district attorney of the judicial district in which Hancock County is located also had such right, and could maintain the action in Hinds County. *State ex rel. Cowan v. State Highway Com.*, 195 Miss. 657, 13 So. 2d 614, 1943 Miss. LEXIS 120 (Miss. 1943).

The writ of mandamus is distinct from ordinary suits; it is a prerogative writ issued by the state through such representatives as it may impress with that power, and under this section [Code 1942, § 1109], suits involving the public interest are to be brought on the petition of the attorney general or a district attorney. *Hancock County v. State Highway Com.*, 188 Miss. 158, 193 So. 808, 1940 Miss. LEXIS 15 (Miss. 1940).

This section [Code 1942, § 1109] does not authorize a county to bring an action of mandamus to compel the state highway commission to allow the county moneys expended in building a bridge, since mandamus affecting public interest can only

be brought by the attorney general or by a district attorney under this section. *Hancock County v. State Highway Com.*, 188 Miss. 158, 193 So. 808, 1940 Miss. LEXIS 15 (Miss. 1940).

4. Propriety of remedy.

Mandamus is proper remedy to compel any inferior tribunal, corporation, board, officer, or person to do or not to do an act, performance or omission of which law specially enjoins as duty resulting from office, trust, or station. *Jacobs v. Bodie*, 208 Miss. 779, 45 So. 2d 587, 1950 Miss. LEXIS 297 (Miss. 1950).

5. —Discretionary matters.

Circuit court erred in issuing the writ of mandamus under Miss. R. App. P. 21 because the justice court judge's decisions to deny any further continuance and to proceed to trial on the misdemeanor DUI charge in petitioner's absence pursuant to Miss. Code Ann. § 99-17-9 were discretionary, and appeals from the justice court to the circuit court required a trial *de novo*, pursuant to Miss. Code Ann. § 99-35-1 and Miss. Unif. Cir. & County Ct. Prac. R. 12.02; thus, the writ of mandamus was the improper procedural tool to remedy petitioner's grievances regarding the denial of a continuance and proceeding to trial in petitioner's absence and, therefore, the grant of the writ of mandamus was in error. *In re Chisolm*, 837 So. 2d 183, 2003 Miss. LEXIS 42 (Miss. 2003).

Mandamus would not lie with respect to effecting of proper conduct of coroner's inquest proceeding, such proceeding involving more than a merely ministerial act. *Chisolm v. Bozeman*, 336 So. 2d 1313, 1976 Miss. LEXIS 1560 (Miss. 1976).

A trial judge must have control of his docket and should be accorded reasonable latitude with respect to it and a certain amount of judicial discretion in the setting, disposition, and continuance of cases, so that only in a case of the clearest abuse of such discretion would a circuit judge's actions with respect to the docket settings in his court be subjected to control by mandamus. *Boydston v. Perry*, 249 So. 2d 661, 1971 Miss. LEXIS 1172 (Miss. 1971).

A writ of mandamus can compel an inferior tribunal to exercise its discretion

but it cannot control the same. *Powell v. State Tax Com.*, 233 Miss. 185, 101 So. 2d 350, 1958 Miss. LEXIS 368 (Miss. 1958).

Since the commissioner, in denying the applicant a permit to sell beer at retail, was not acting ministerially but in the exercise of discretion, the action of the trial judge in refusing to grant the writ of mandamus was affirmed. *Powell v. State Tax Com.*, 233 Miss. 185, 101 So. 2d 350, 1958 Miss. LEXIS 368 (Miss. 1958).

Mandamus was not the proper remedy to obtain relief from the action of the board of disability and relief appeal, in denying benefits to a policeman's widow from a relief fund for firemen and policemen, where such board did not refuse to act but in the exercise of its discretion denied relief. *City of Clarksdale v. Harris*, 188 Miss. 806, 196 So. 647, 1940 Miss. LEXIS 86 (Miss. 1940).

Statute providing that state auditor should issue warrants for fees of county officers in connection with lands sold to state for taxes after receiving land commissioner's calculations as to fees, if auditor should find fees correct, conferred upon auditor exercise of discretion and judgment in passing on fees, so that county officer was not entitled to mandamus to compel auditor to issue warrants without first bringing suit. *Thomas v. Price*, 171 Miss. 450, 158 So. 206, 1934 Miss. LEXIS 284 (Miss. 1934).

Mandamus will not lie to compel extension of municipal water system for connection to new addition over distance of 700 feet the matter being discretionary with city authorities. *City of Greenwood v. Provine*, 143 Miss. 42, 108 So. 284, 1926 Miss. LEXIS 242 (Miss. 1926).

Act of insurance commission in licensing insurance companies to do business in this state are not reviewable by mandamus on the ground that the company's policy on its face violates statute, nor can mandamus to compel him to revoke such license for subsequent acts be sustained without proof *dehors* the policy itself. *Cole v. State*, 91 Miss. 628, 45 So. 11, 1907 Miss. LEXIS 168 (Miss. 1907).

In approving or disapproving bonds of county officers, the president of the board of supervisors acts judicially, and however unjust or arbitrary his acts may be, they

are not subject to revision by mandamus. *Shotwell v. Covington*, 69 Miss. 735, 12 So. 260, 1892 Miss. LEXIS 17 (Miss. 1892).

Where a discretion is left in an inferior tribunal, the writ of mandamus can only compel it to act, but cannot control the discretion. *Madison County Court v. Alexander*, 1 Miss. 523, 1832 Miss. LEXIS 13 (Miss. 1832); *Board of Police v. Grant*, 17 Miss. 77, 1847 Miss. LEXIS 91 (Miss. 1847); *Swan v. Gray*, 44 Miss. 393, 1870 Miss. LEXIS 124 (Miss. 1870); *Vicksburg v. Rainwater*, 47 Miss. 547, 1872 Miss. LEXIS 90 (Miss. 1872); *Clayton v. McWilliams*, 49 Miss. 311, 1873 Miss. LEXIS 117 (Miss. 1873); *State Board of Education v. West Point*, 50 Miss. 638, 1874 Miss. LEXIS 103 (Miss. 1874); *Board of Supervisors v. State*, 63 Miss. 135, 1885 Miss. LEXIS 33 (Miss. 1885); *Greenwood v. Provine*, 143 Miss. 42, 108 So. 284, 1926 Miss. LEXIS 242 (Miss. 1926); *Alex Loeb, Inc., v. Board of Trustees*, 171 Miss. 467, 158 So. 333, 1935 Miss. LEXIS 2 (Miss. 1935); *Clarksdale v. Harris*, 188 Miss. 806, 196 So. 647, 1940 Miss. LEXIS 86 (Miss. 1940).

6. —Moot questions.

Mandamus properly dismissed on question becoming moot. *State ex rel. Horton v. Lawrence*, 121 Miss. 338, 83 So. 532, 1919 Miss. LEXIS 168 (Miss. 1919).

A petition for mandamus against officers for the performance of duties enjoined by the statute will be dismissed when the statute, pending an appeal by the defendants, is repealed in so far as the petitioner can claim any right thereunder. *McClurg v. Wineman*, 80 Miss. 73, 31 So. 537 (Miss. 1902).

7. —Election matters.

The petitioners were not entitled to a writ of mandamus to require a city to call an election under Code 1942, § 7322-23, pursuant to the issuance of bonds for the purpose of carrying out an urban renewal project, where in their petition for the writ they did not allege and claim that they had an interest separate from or in excess of that of the general public or that they would suffer any special legal injury or personal damages apart from the body of citizens of the city as a whole. *Wilson v.*

Laurel, 249 So. 2d 801, 1971 Miss. LEXIS 1180 (Miss. 1971).

Mandamus did not lie to require county election commissioners to restore name erased from registration books on ground petitioner had become disqualified as elector. *Calvert v. Crosby*, 163 Miss. 177, 139 So. 608, 1932 Miss. LEXIS 25 (Miss. 1932).

As to mandamus to compel mayor and board of aldermen to order an election. *Mayor & Board of Aldermen of Jackson v. State*, 102 Miss. 663, 59 So. 873, 1912 Miss. LEXIS 105 (Miss. 1912).

Where commissioners of election reject an entire ballot box on the ground of illegal votes, mandamus will lie to compel them to reassemble and canvass and return the ballots. *State ex rel. Hudson v. Pigott*, 97 Miss. 599, 54 So. 257 (Miss. 1910).

Mandamus not maintainable in primary election contests. *State ex rel. Barbee v. Brown*, 90 Miss. 876, 44 So. 769, 1907 Miss. LEXIS 119 (Miss. 1907).

Where a municipal charter requires the mayor and aldermen to appoint election commissioners, and after the close of the polls to ascertain the results in the presence of the mayor and at least one alderman, who, with the commissioners, shall certify the returns, the duty of the mayor to certify the returns is ministerial, and he may be compelled to do so by mandamus. *Bourgeois v. Fairchild*, 81 Miss. 708, 33 So. 495, 1902 Miss. LEXIS 191 (Miss. 1902).

A writ of mandamus will not lie for the purpose of inquiring into the qualifications of electors, or the legality of an election as affected by matters not apparent on the face of the returns. *State ex rel. Attorney Gen. v. Board of Sup'Rs.*, 91 Miss. 582, 3 So. 143, 1907 Miss. LEXIS 131 (Miss. 1907).

8. —Payment of claims.

Order of board of supervisors allowing claim, not act of clerk issuing warrant, must be foundation of mandamus proceeding against board to compel payment of warrant. *Tullos v. Board of Supervisors*, 208 Miss. 705, 45 So. 2d 349, 1950 Miss. LEXIS 289 (Miss. 1950).

Petition for mandamus against county board of supervisors to compel payment of

warrants is properly dismissed when neither petition nor proof showed steps necessary to make valid contracts had been taken, and orders of board allowing accounts neither showed nor recited jurisdictional facts, there was nothing in orders to show existence of contracts between board and creditor, nothing in records showing call for bids, submission of bids, or making of contracts, and no statement or bills in record showed existence of these accounts. *Tullos v. Board of Supervisors*, 208 Miss. 705, 45 So. 2d 349, 1950 Miss. LEXIS 289 (Miss. 1950).

Formal written demand upon the state highway commission was not prerequisite to relief in mandamus to compel the commission to appraise and reimburse county for the value of paving on state highway, pursuant to Code 1942, § 8036, where formal written notice would not have availed the county. *State Highway Com. v. McGowen*, 198 Miss. 853, 23 So. 2d 893, 1945 Miss. LEXIS 261 (Miss. 1945).

Order of county board of supervisors allowing three claims each for less than \$250 although their total exceeded that amount, was sufficient on its face to constitute a valid and binding judgment, the payment of which the holders thereof were entitled to compel by mandamus, although the order did not recite jurisdictional facts reciting competitive bids. *Clayton v. Paden*, 198 Miss. 163, 21 So. 2d 823, 1945 Miss. LEXIS 179 (Miss. 1945).

The chancery court was without jurisdiction to grant a mandatory writ of injunction to a county to compel the state highway commission to appraise the pavement of sections of state highway built at local expense and to pay the county therefor, as provided by statute, mandamus being the proper remedy for the county to pursue. *Madison County v. Mississippi State Highway Com.*, 191 Miss. 192, 198 So. 2d 284, 198 So. 2d 284, 1940 Miss. LEXIS 255 (Miss. 1940).

That governor as chairman of building commission could not be compelled to sign certificate for claimant's warrant held not to deprive claimant of right to have mandamus issued against secretary of commission. *Trotter v. Frank P. Gates & Co.*, 162 Miss. 569, 139 So. 843, 1932 Miss. LEXIS 150 (Miss. 1932).

Mandamus will not lie to compel county to pay salary of prosecuting attorney. *Board of Sup'rs v. State*, 134 Miss. 180, 98 So. 593, 1924 Miss. LEXIS 252 (Miss. 1924).

Mandamus will not lie to compel supervisors to issue warrant in payment of claim for refund of taxes allowed by auditor and attorney-general. *Pearl River County v. Lacey Lumber Co.*, 128 Miss. 885, 91 So. 572, 1922 Miss. LEXIS 149 (Miss. 1922).

County board of supervisors may be compelled by mandamus to pay judgment from its general fund or to levy a tax. *Town of Crenshaw v. Jackson*, 122 Miss. 711, 84 So. 912, 1920 Miss. LEXIS 471 (Miss. 1920).

Mandamus proper remedy to compel clerk of separate district to issue warrant to pay compensation to school superintendent. *Ladner v. Talbert*, 121 Miss. 592, 83 So. 748 (Miss. 1920).

Constitution 1890 § 212 fixing the rate of interest to be paid by the state upon trust funds held by it for educational purposes and the dates for the distribution of same, is not self-executing, and the courts will not compel the auditor to issue a warrant in payment of the state's obligation thereunder in the absence of legislative appropriation for that purpose. *State ex rel. Barron v. Cole*, 81 Miss. 174, 32 So. 314, 1902 Miss. LEXIS 108 (Miss. 1902).

The board of supervisors is without discretion to reject an allowance by the circuit court to its clerk, under Code 1892, § 1995 (Code 1906, § 2171), and may be compelled by mandamus to provide for its payment. *Chatters v. Coahoma County*, 73 Miss. 351, 19 So. 107, 1895 Miss. LEXIS 138 (Miss. 1895).

The writ should be allowed as to the items of an account that the board has illegally rejected, although the account may contain another item that it has legally rejected, in view of the strongly remedial nature of the statute assimilating mandamus proceedings to ordinary actions at law. *Chatters v. Coahoma County*, 73 Miss. 351, 19 So. 107, 1895 Miss. LEXIS 138 (Miss. 1895).

The equitable assignee of a part of a claim against a county cannot by mandamus compel the supervisors to make an

allowance and issue a warrant in his favor. *Foote v. Board of Supervisors*, 67 Miss. 156, 6 So. 612, 1889 Miss. LEXIS 2 (Miss. 1889).

Mandamus is the proper remedy to enforce the payment of valid claims against towns which have been audited and allowed. *Kelly v. Wimberly*, 61 Miss. 548, 1884 Miss. LEXIS 127 (Miss. 1884).

Mandamus is the proper remedy to enforce the payment of valid claims against counties which have been audited and allowed. *Beard v. Board of Supervisors*, 51 Miss. 542, 1875 Miss. LEXIS 77 (Miss. 1875); *Board of Supervisors v. Arrghi*, 51 Miss. 667, 1875 Miss. LEXIS 93 (Miss. 1875); *Klein v. Board of Supervisors*, 54 Miss. 254, 1876 Miss. LEXIS 27 (Miss. 1876); *Honea v. Board of Supervisors*, 63 Miss. 171, 1885 Miss. LEXIS 42 (Miss. 1885); *Taylor v. Board of Sup'rs*, 70 Miss. 87, 12 So. 210, 1892 Miss. LEXIS 107 (Miss. 1892).

9. —Tax matters.

Mandamus will lie to require drainage commissioners to assemble and act in matter of making additional assessments. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476, 1931 Miss. LEXIS 281 (Miss. 1931).

Drainage commissioners cannot be required by mandamus to make such assessment of benefits as will be sufficient to pay indebtedness due contractor. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476, 1931 Miss. LEXIS 281 (Miss. 1931).

Mandamus proper remedy to compel board of supervisors to increase valuations as ordered by tax commission. *Taylor v. State*, 121 Miss. 771, 83 So. 810, 1920 Miss. LEXIS 121 (Miss. 1920).

Mandamus cannot be issued to compel levy of tax beyond statutory limit. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 1910 Miss. LEXIS 247 (Miss. 1910).

Mandamus will lie to compel tax collector to collect assessment on property that has escaped taxation though some of the assessments may be barred. *Adams v. Clarksdale*, 95 Miss. 88, 48 So. 242, 1909 Miss. LEXIS 202 (Miss. 1909).

Mandamus will lie to compel the assessor to assess property that has escaped taxation for former years. *State ex rel. District Attorney v. Simmons*, 70 Miss.

485, 12 So. 477, 1892 Miss. LEXIS 130 (Miss. 1892), limited, *Barnes v. Jones*, 139 Miss. 675, 103 So. 773, 1925 Miss. LEXIS 115 (Miss. 1925).

10. —Bond issues.

Mandamus will lie to compel board of supervisors to issue bonds for purpose of acquiring land for constructing and operating a community hospital after election in favor thereof was had pursuant to the provisions of Laws 1944, ch 277, as amended by Laws 1946, ch 412 (Code 1942, §§ 7129-50 et seq.), notwithstanding subsequent order of board rescinding its action, since a validating act eliminated any irregularity in the proceeding with respect to the election. *Board of Sup'rs v. State*, 206 Miss. 443, 40 So. 2d 273, 1949 Miss. LEXIS 272 (Miss. 1949).

Company selling goods to county held not entitled to mandatory order requiring board of supervisors to issue bonds to pay claim, where seller did not show it would be entitled as matter of right to have clerk issue warrant if money were available to pay it. *American Oil Co. v. Bishop*, 163 Miss. 249, 141 So. 271, 1932 Miss. LEXIS 35 (Miss. 1932).

Mandamus proper remedy to enforce ministerial act of board of supervisors in issuing road district bonds. *Board of Sup'rs v. Dean*, 120 Miss. 334, 82 So. 257, 1919 Miss. LEXIS 90 (Miss. 1919).

Mandamus will not lie to compel supervisors to issue bonds for roads. *Robinson v. Board of Sup'rs*, 105 Miss. 90, 62 So. 3, 1913 Miss. LEXIS 185 (Miss. 1913).

11. —School matters.

A petition for a writ of mandamus filed by a county board of education against the board of supervisors of funds earmarked for the use of the schools will be dismissed because the county board of education had no authority to compel the board of supervisors to act by issuance of a writ of mandamus. *Board of Education v. Sigler*, 208 So. 2d 890, 1968 Miss. LEXIS 1433 (Miss. 1968).

A writ of mandamus was properly refused in action by school principal against county superintendent of education, to which county board of education was not a party, to require payment of principal's

salary for a period of time during which he was required by order of the board to take a leave of absence, for the board alone has control of school funds, and to have granted writ would have left superintendent in precarious position and subjected him to possible further litigation. *Chatham v. Johnson*, 195 So. 2d 62, 1967 Miss. LEXIS 1425 (Miss. 1967).

Where the members of a board have exercised their discretion as to whether or not they should risk incurring court costs and the expenditure of funds for attorneys' fees in connection with a suit to require a contractor to carry out the terms for construction of a high school and to make good on defects therein, their discretion cannot be controlled by a mandamus, nor can they be required to act in a prescribed manner to obtain relief on account of the defects complained of. *State by Coleman v. Cameron*, 223 Miss. 50, 77 So. 2d 716, 1955 Miss. LEXIS 351 (Miss. 1955).

Mayor could not be compelled to execute and deliver a warrant, upon requisition by board of trustees, on maintenance fund in municipal separate school district for the payment of an installment due on building contract for the construction of a gymnasium and vocational training building instead of against a bond and building fund containing ample funds for that purpose. *Williams v. State*, 209 Miss. 251, 46 So. 2d 591, 1950 Miss. LEXIS 385 (Miss. 1950).

Order of county school board detaching territory of outlying school district and adding it to another district in adjacent county without concurrent action by school board of other county was ineffectual as ground for refusal of board of supervisors to continue annual tax levy for the school district and to constitute a defense to mandamus proceedings to compel the board of supervisors to levy such tax. *State ex rel. Chatham v. Bd. of Supervisors*, 209 Miss. 79, 46 So. 2d 73, 1950 Miss. LEXIS 363 (Miss. 1950).

Where school tax was originally ordered on petition of a majority of the electors of school district, the board of supervisors was under a duty to continue the tax for successive years so long as the school district is maintained unless changed by

petition of a majority of the electors of the district, and mandamus will lie at the suit of the district attorney to compel the board to levy such tax upon their neglect or refusal. *State ex rel. Chatham v. Bd. of Supervisors*, 209 Miss. 79, 46 So. 2d 73, 1950 Miss. LEXIS 363 (Miss. 1950).

Mandamus will lie against trustees of consolidated school district to issue trustee order for payment of balance due under contract to build auditorium for total cost price set out in accepted bid, since simple mathematical process of subtraction of sum of payments made demonstrates amount due, and no judicial attributes or exercise of discretion is involved. *Jacobs v. Bodie*, 208 Miss. 779, 45 So. 2d 587, 1950 Miss. LEXIS 297 (Miss. 1950).

Under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district, board of supervisors may issue bonds for such consolidated school district for purposes therein set out, it becomes mere ministerial duty of board of supervisors to issue bonds for consolidated school district as petitioned for, performance of which duty can be compelled by mandamus, when all jurisdictional facts have been affirmatively adjudicated by board, or by circuit court upon appeal from order of board on bill of exceptions, to be present. *Board of Sup'rs v. State*, 205 Miss. 43, 38 So. 2d 314, 1949 Miss. LEXIS 410 (Miss. 1949).

Under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district, board of supervisors may issue bonds for such consolidated school district for purposes therein set out, it is judicial function of board to decide question of whether or not majority of qualified electors of school district have petitioned for issuance of bonds, to determine whether amount petitioned for will exceed any statutory limitation thereon, and to determine whether or not bonds are to be issued for purposes authorized by law and this judicial function of board cannot be controlled by writ of mandamus. *Board of Sup'rs v. State*, 205 Miss. 43, 38 So. 2d 314, 1949 Miss. LEXIS 410 (Miss. 1949).

When board of supervisors, acting under Code 1942, § 6370, providing that on

petition of majority of qualified electors residing in consolidated school district, board may issue bonds for such district for purposes therein set out, rejects such petition for reasons it deems sufficient, or for no reason at all, without adjudicating necessary jurisdictional facts to exist, remedy of petitioners is appeal to circuit court under Code 1942, § 1195, and not writ of mandamus under this section [Code 1942, § 1109], on which appeal petitioners can obtain in circuit court adjudication of all jurisdictional facts which are alleged to have existed by having embodied such facts in bill of exceptions. *Board of Sup'rs v. State*, 205 Miss. 43, 38 So. 2d 314, 1949 Miss. LEXIS 410 (Miss. 1949).

Mandamus proper remedy to require superintendent to contract with qualified teacher selected by trustees of district. *State ex rel. Cowan v. Morgan*, 141 Miss. 585, 106 So. 820, 1926 Miss. LEXIS 459 (Miss. 1926).

Mandamus will lie to compel school trustees to receive children wrongfully excluded from school. *Clark v. Board of Trustees*, 117 Miss. 234, 78 So. 145, 1918 Miss. LEXIS 168 (Miss. 1918).

A public schoolteacher duly licensed to teach has a valuable right, the loss of which cannot be compensated in damages, and for the protection of which he is entitled to a mandamus. *Brown v. Owen*, 75 Miss. 319, 23 So. 35, 1897 Miss. LEXIS 131 (Miss. 1897).

12. —Miscellaneous cases.

Petition for writ of prohibition was denied where discovery of alleged trade secrets was sought, although issuance of protective order concerning disclosure of alleged trade secrets was found to be appropriate. *American Tobacco Co. v. Evans*, 508 So. 2d 1057, 1987 Miss. LEXIS 2498 (Miss. 1987).

Where the charges made by the game and fish commission to support the discharge of a game warden were not sufficient to comply with the statute, the action of the trial court in a mandamus action in entering judgment reinstating him to his position was not contrary to the overwhelming weight of the law and evidence. *Vinzant v. Poole*, 185 So. 2d 919, 1966 Miss. LEXIS 1535 (Miss. 1966).

No relief through mandamus can be granted against public officers to compel them to perform their duties generally, but petition for mandamus against public officers must charge them with failure to perform specific duty. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

It is reversible error for trial court to overrule motion for change of venue to official domicile made by commissioner of state highway patrol in mandamus proceeding brought in county other than his official domicile, where no case for relief is stated against patrolmen who were joined with commissioner as defendants for sole purpose of retaining venue in county in which proceeding is filed. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

Mandamus is a proper remedy to enforce stockholder's right to inspect the books of the corporation. *Sanders v. Neely*, 197 Miss. 66, 19 So. 2d 424, 1944 Miss. LEXIS 276 (Miss. 1944).

Stockholder of domestic insurance corporation was entitled to mandamus to compel inspection of books and records of corporations, upon petition alleging that purpose of such request was "in order to ascertain and know how the affairs of the company are conducted and whether or not the capital of which he has contributed a share is being prudently and properly employed, and in order that he may protect the business and interest of said corporation and his interest as such stockholder," unless the executive officers of the corporation plead and prove as an affirmative defense that the stockholder is actuated by bad motives or that the inspection is not desired in order to obtain information germane to his interest as stockholder, but is for speculative purposes or to gratify idle curiosity, or out of spirit of hostility to the welfare of the corporation. *Sanders v. Neely*, 197 Miss. 66, 19 So. 2d 424, 1944 Miss. LEXIS 276 (Miss. 1944).

Action in mandamus by attorney general to compel board of supervisors to repair a bridge on highway No. 7 could not be maintained where there was no allegation that the board had failed to provide and maintain a bridge adequate for travel

in lieu of the collapsed bridge, and the court had no power or authority to tell the board of supervisors in specific terms what kind of a bridge it should maintain at the location in question. *State ex rel. Attorney Gen. v. Board of Supervisors*, 196 Miss. 806, 17 So. 2d 433, 1944 Miss. LEXIS 258 (Miss. 1944).

Mandamus was proper remedy to compel city officials to comply with statute providing for retirement benefits for firemen and policemen. *Mayor & Aldermen of Vicksburg v. Crichlow*, 196 Miss. 259, 16 So. 2d 749, 1944 Miss. LEXIS 185 (Miss. 1944).

A bank was entitled to maintain mandamus action against a corporation to compel it to issue a new certificate of stock in exchange for the original certificate which the original stockholder had indorsed in blank and delivered to the bank, notwithstanding that the pleading showed that the stock was claimed by a third person who held a certificate thereto pursuant to the request of the administrator of the original stockholder and that the original certificate was lost or destroyed. *Jackson Opera House Co. v. Cox*, 188 Miss. 237, 191 So. 665, 192 So. 293, 1939 Miss. LEXIS 4 (Miss. 1939).

Mandamus will not lie when act is only done in case another person approves thereof. *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

Writ of mandamus will not be issued to direct inferior tribunal to decide issue of fact in particular way, when law has invested tribunal with original jurisdiction to decide question. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287, 1930 Miss. LEXIS 43 (Miss. 1930).

Where ordinance designated property as residential property, and question was doubtful, court would not interfere by mandamus to compel issuance of building permit. *City of Jackson v. McPherson*, 158 Miss. 152, 130 So. 287, 1930 Miss. LEXIS 43 (Miss. 1930).

Mandamus will lie to compel purchaser of property and franchises of electric lighting plant to operate the plant for the benefit of the public. *State ex rel. Howie v. Benson*, 108 Miss. 779, 67 So. 214, 1914 Miss. LEXIS 274 (Miss. 1914).

Mandamus will not lie to compel street railway company to operate cars on a

portion of track abandoned and ordered removed by the board of supervisors as a nuisance. *Wright v. Edwards H. & C. R. Co.*, 101 Miss. 470, 58 So. 332, 1911 Miss. LEXIS 159 (Miss. 1911).

Mandamus is maintainable against city officers. *Adams v. Clarksdale*, 95 Miss. 88, 48 So. 242, 1909 Miss. LEXIS 202 (Miss. 1909).

Mandamus will lie to compel board of aldermen to expunge void act from its records. *Adams v. Clarksdale*, 95 Miss. 88, 48 So. 242, 1909 Miss. LEXIS 202 (Miss. 1909).

A contractor for public work cannot mandamus the board of supervisors to have the work inspected and approved, under Code 1892, § 342, the section being alone for the security of the county. *Young v. Leflore County*, 81 Miss. 466, 33 So. 410, 1902 Miss. LEXIS 177 (Miss. 1902).

Mandamus lies to compel a board of supervisors to perform the duty imposed by Code 1892, § 2061 (Code 1906, § 2240), as to jointly building and maintaining a fence at or near the county line to prevent stock straying from a county in which the stock law has not been adopted into an adjoining county where it is in force. *Board of Sup'rs v. State*, 70 Miss. 769, 12 So. 904 (Miss. 1893); *Montgomery County v. State*, 71 Miss. 153, 15 So. 28, 1893 Miss. LEXIS 198 (Miss. 1893).

Officers and tribunals have no right to refuse to enforce a statute because it may be thought unwise; and they may be forced by mandamus to act. *Board of Supervisors v. State*, 63 Miss. 135, 1885 Miss. LEXIS 33 (Miss. 1885).

The governor cannot be compelled by mandamus to perform any act. *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 1883 Miss. LEXIS 79 (Miss. 1883); *Wood v. State*, 169 Miss. 790, 142 So. 747, 1932 Miss. LEXIS 8 (Miss. 1932).

A judge may be compelled by mandamus to sign a bill of exceptions. *Williams v. Ramsey*, 52 Miss. 851, 1876 Miss. LEXIS 306 (Miss. 1876), limited, *Rankin County Savings-Bank v. Johnson*, 56 Miss. 125, 1878 Miss. LEXIS 46 (Miss. 1878).

13. Defenses.

Where the game and fish commission was in no way adversely affected by the

plaintiffs delay of seven months in filing a mandamus action for reinstatement to the position from which he had been unlawfully discharged, and there was no evidence of laches on plaintiff's part, the judgment of the lower court reinstating the plaintiff was affirmed. *Cannada v. Marlar*, 185 So. 2d 649, 1966 Miss. LEXIS 1514 (Miss. 1966).

It is no defense in a mandamus suit by stockholder of a domestic insurance corporation to compel inspection of the books and records of the corporation that, if one stockholder is given that right, all the stockholders can demand the same right, thereby interrupting the orderly conduct of the business of the corporation. *Sanders v. Neely*, 197 Miss. 66, 19 So. 2d 424, 1944 Miss. LEXIS 276 (Miss. 1944).

It was no defense in mandamus suit by stockholder of domestic insurance corporation to compel the officers thereof to permit inspection of the books and records of the corporation, that the officers of the corporation refused to permit such inspection pursuant to interpretation of insurance commissioner, based upon erroneous advice obtained from the state's legal department that the stockholder's common-law right of inspection had been abrogated by the insurance laws. *Sanders v. Neely*, 197 Miss. 66, 19 So. 2d 424, 1944 Miss. LEXIS 276 (Miss. 1944).

The unconstitutionality of the statute creating the duty the performance of which is sought is an available defense. *Toombs v. Sharkey*, 140 Miss. 676, 106 So. 273, 1925 Miss. LEXIS 304 (Miss. 1925).

No defense to mandamus to compel county to pay a valid claim, that officers in charge of funds have illegally used them to pay other claims. *Hebron Bank v. Lawrence County*, 109 Miss. 397, 69 So. 209, 1915 Miss. LEXIS 170 (Miss. 1915).

It is no defense to a mandamus to compel a county which has not adopted the stock law to build half of a fence between it and an adjoining county in which the law has been declared in force, or to pay half the expense of erecting such fence, to plead the invalidity of the election in the other county. *Montgomery County v. State*, 71 Miss. 153, 15 So. 28, 1893 Miss. LEXIS 198 (Miss. 1893).

Nor is it an answer that the other county has already built the larger part of

the fence, and it is no objection to the form of a judgment that it is in the alternative, commanding defendant to join in defraying the expense, or to erect half the fence. *Montgomery County v. State*, 71 Miss. 153, 15 So. 28, 1893 Miss. LEXIS 198 (Miss. 1893).

It is no defense to an application for a mandamus to compel the issuance of a patent to state land that there is an outstanding title in a stranger. *Myers v. State*, 61 Miss. 138, 1883 Miss. LEXIS 86 (Miss. 1883).

14. Judgment.

Although mandamus would issue to compel state highway commission to appraise and reimburse county for paving part of final location of state highway under Code 1942, § 8036 where the commission has on hand money for the appraisal and which is at its command for that purpose, the order will not include payment of the appraised amount where the commission does not have on hand, or within prospect without legislative aid, the sums needed to pay the appraisal along with similar demands of other counties. *State Highway Com. v. McGowen*, 198 Miss. 853, 23 So. 2d 893, 1945 Miss. LEXIS 261 (Miss. 1945).

Judgment in mandamus action to compel city to comply with statute creating retirement benefits for firemen and policemen, was too broad in assuming to adjudge merits of petitioner's claim, in that it included a prejudgment of matters within the discretion of the board, created by the act, and as applying to duties imposed upon the city which could not be enforced by mandamus. *Mayor & Aldermen of Vicksburg v. Crichlow*, 196 Miss. 259, 16 So. 2d 749, 1944 Miss. LEXIS 185 (Miss. 1944).

Judgment in mandamus to compel payment of prior judgment, not void because against mayor and board of aldermen where suit was against town. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 1910 Miss. LEXIS 247 (Miss. 1910).

Judgment in mandamus against town operates on the clerk and other officers thereof. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 1910 Miss. LEXIS 247 (Miss. 1910).

The circuit court cannot fix the time and place for the meeting of the eminent domain court, and in awarding mandamus it can only command the justice to reconvene the court and proceed according to law. *Sullivan v. Yazoo & M. V. R. Co.*, 85 Miss. 649, 38 So. 33, 1904 Miss. LEXIS 177 (Miss. 1904).

15. Injunction against issuance.

Prosecution of mandamus proceedings can be restrained. *Humphreys County v. Cashin*, 136 Miss. 476, 101 So. 571, 1924 Miss. LEXIS 157 (Miss. 1924).

County's suit to enjoin prosecution of mandamus or an alternative for judgment on indemnity bond held within jurisdiction of equity. *Humphreys County v. Cashin*, 136 Miss. 476, 101 So. 571, 1924 Miss. LEXIS 157 (Miss. 1924).

16. Miscellaneous.

A circuit court had jurisdiction to issue a writ of mandamus compelling a city to comply with an order of its civil service commission to reinstate an employee where the city had placed the employee in a different job position from the one she had previously held; placement of the employee in another position at the same salary was not "reinstatement" which entitles an employee to be reinstated in the position from which he or she was removed. *City of Jackson v. Martin*, 623 So. 2d 253, 1993 Miss. LEXIS 316 (Miss. 1993).

Equity will not grant a mandatory injunction to a county against the state highway commission on the ground that an adequate remedy by mandamus is unavailable, because the attorney general is required by law to represent the commission in suits brought against it, and that, therefore, he is not available to represent the county in a proceeding by mandamus against the commission, where the complaint contained no allegation that a request was ever made that either the attorney general or any of the district attorneys of the state permit the use of

their names to bring a mandamus proceeding on petition of the state on relation of such an officer, or that such a request would have been of no avail. *Madison County v. Mississippi State Highway Com.*, 191 Miss. 192, 198 So. 2d 284, 198 So. 284, 1940 Miss. LEXIS 255 (Miss. 1940).

Where petition for mandamus was sufficient to charge that commissioners of drainage district had failed to make annual assessment as required to do by statute and which was necessary as predicate to action by board of supervisors in making annual tax levy, neither board of supervisors nor tax collectors were necessary parties in mandamus proceeding to compel payment of bonds. *Johnson v. Bruce*, 177 Miss. 581, 171 So. 685, 1937 Miss. LEXIS 143 (Miss. 1937).

Where jurisdiction of law court to remedy official inaction was not wholly of statutory origin, supreme court could not reverse decree in equity enjoining officials to make assessment because equity court was without jurisdiction. *Anderson v. Robins*, 161 Miss. 604, 137 So. 476, 1931 Miss. LEXIS 281 (Miss. 1931).

On appeal from judgment improperly refusing mandamus to compel commissioners of election to reassemble and canvass and return the ballots, the supreme court will not remand case but will render judgment requiring them to do so. *State ex rel. Hudson v. Pigott*, 97 Miss. 599, 54 So. 257 (Miss. 1910).

In mandamus to compel supervisors to meet and declare the result of an election, no evidence is admissible except the report of the election commissioners. *McHenry v. State*, 91 Miss. 562, 44 So. 831, 1907 Miss. LEXIS 155 (Miss. 1907).

In mandamus by a teacher to enforce her rights under contract, it is competent to show that a trustee, notwithstanding the irregularity in his election, had been recognized as trustee by the county superintendent and others. *Whitman v. Owen*, 76 Miss. 783, 25 So. 669, 1899 Miss. LEXIS 17 (Miss. 1899).

OPINIONS OF THE ATTORNEY GENERAL

If the Clerk of the Board of Supervisors believes the Board of Supervisors has is-

sued an order directing the Clerk to act, when in good faith such action is believed

by the Clerk to be improper or illegal, the appropriate action in such a case would be for the Clerk to seek judicial review of the board's order. Blackwell, April 27, 1995, A.G. Op. #95-0193.

Miss. Code Ann. § 21-8-19 requires a mayor who is unable to serve due to absence, disability or other causes to appoint a member of the city council to assume the duties of the mayor. The appointee cannot be a city employee or a group of city

employees, however a mayor may delegate certain powers to city employees in the ordinary course of business. When a mayor is unable to serve for sixty consecutive days, the city council is required to appoint one of its members as acting mayor and may be forced to do so by a writ of mandamus. McLemore, February 23, 2007, A.G. Op. #07-00087, 2007 Miss. AG LEXIS 32.

RESEARCH REFERENCES

ALR.

Mandamus as remedy to compel assertedly disqualified judge to rescue self or to certify his disqualification. 45 A.L.R.2d 937.

Prohibition as appropriate remedy to restrain civil action for lack of jurisdiction of the person. 92 A.L.R.2d 247.

Prohibition as appropriate remedy to prevent allegedly disqualified judge from proceeding with case. 92 A.L.R.2d 306.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Availability of mandamus or prohibition to compel or to prevent discovery proceedings. 95 A.L.R.2d 1229.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 A.L.R.3d 1360.

Mandamus to compel zoning officials to cancel permit granted in violation of zoning regulation. 68 A.L.R.3d 1656.

Mandamus, under 28 USCS § 1361, to compel prompt hearing in appeal from denial of Social Security disability benefits. 47 A.L.R. Fed. 929.

Mandamus as remedy to compel disqualification of federal judge. 56 A.L.R. Fed. 494.

Am. Jur.

52 Am. Jur. 2d (Rev), Mandamus §§ 29 et seq., 39 et seq., 44 et seq., 57 et seq., 380 et seq.

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Forms 21 et seq. (application for writ).

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Form 172.1 (Demurrer – To petition or application for writ of mandamus).

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Form 191.1 (Order – Dismissing application for writ of mandamus – Multiple bases).

17 Am. Jur. Pl & Pr Forms (Rev), Mandamus, Form 205.1 (Alternative writ of mandamus – To prevent destruction of animals).

20 Am. Jur. Pl & Pr Forms (Rev), Prohibition, Forms 21 et seq. (petition or application for writ).

CJS.

55 C.J.S., Mandamus §§ 28 et seq., 67 et seq., 81–83 et seq., 130 et seq., 158 et seq., 258, 259 et seq., 357–366.

§ 11-41-3. Filing of complaint.

The complaint shall be filed in the circuit court of the county in which the tribunal, corporation, board, officer, or person made defendant, or some one or more of them, shall reside or be found; but if the judge of that court be interested, the complaint may be filed in an adjoining circuit court district.

HISTORY: Codes, 1871, § 1518; 1880, § 2543; 1892, § 2847; 1906, § 3232; Hemingway's 1917, § 2534; 1930, § 2349; 1942, § 1110; Laws, 1991, ch. 573, § 78, eff from and after July 1, 1991.

Cross References — Jurisdiction of circuit court generally, see § 9-7-81.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action by the members of a Confederate Veterans society against a university for violating Miss. Code Ann. § 55-15-81, the circuit court properly ruled that, despite their argument to the contrary and the nomenclature used, the case was a mandamus action and not one for injunctive relief, denied the members' motion to retransfer to the chancery court, and granted a university's motion to dismiss the action for lack of standing because the members failed to challenge the judgment from the chancery court transferring the case, the circuit court had jurisdiction under two statutes, and the members had no private right that entitled them to require that the university refrain from implementing its diversity plan. *Miss. Div. of Sons of Confederate Veterans v. Univ. of Miss.*, 269 So. 3d 1235, 2018 Miss. App. LEXIS 425 (Miss. Ct. App. 2018).

Petitions for mandamus requesting that circuit clerk and justice court clerk be directed to accept in forma pauperis filings were not properly before Supreme Court; petitions should have been filed with circuit court. *Ivy v. State*, 688 So. 2d 223, 1997 Miss. LEXIS 5 (Miss. 1997).

In an action by a forensic psychiatric aide for reinstatement to his former position at a state hospital, the trial court erred in overruling defendant hospital's motion for a change of venue to the county in which it was domiciled and in which its director was a resident. *Mississippi State Hospital v. Crawford*, 372 So. 2d 297, 1979 Miss. LEXIS 2149 (Miss. 1979).

Where there were two suits pending against the superintendent of education for mandamus in connection with proposed lease of certain sixteenth section lands, one in the circuit court brought by the prospective lessees and the other in the Supreme Court brought by the county board of supervisors, the petition filed in the Supreme Court as an original suit would be dismissed because the appeal by the superintendent of education from the

order of the board of supervisors directing the execution of the lease, pending before the Supreme Court, could not be cut off in this manner and, secondly, statutory jurisdiction of a mandamus suit against an official such as the superintendent of education was vested in the circuit court whose jurisdiction could not be circumvented by the filing of an independent and original case in the Supreme Court. *State ex rel. Herring v. Cox*, 285 So. 2d 462, 1973 Miss. LEXIS 1288 (Miss. 1973).

In a case showing the clearest abuse of judicial discretion in a circuit judge's actions with respect to the docket headings in his court, original jurisdiction of the proceedings must necessarily rest with the Supreme Court, although factual questions might be heard by a specially designated trial judge appointed by the Supreme Court to act as the trier of fact. *Boydston v. Perry*, 249 So. 2d 661, 1971 Miss. LEXIS 1172 (Miss. 1971).

Proper venue of mandamus proceeding against commissioner of Mississippi highway safety patrol is public officer's official domicile; that is, the City of Jackson in the First Judicial District of Hinds County. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

It is reversible error for trial court to overrule motion for change of venue to official domicile made by commissioner of state highway patrol in mandamus proceeding brought in county other than his official domicile where no case for relief is stated against patrolmen who were joined with commissioner as defendants for sole purpose of retaining venue in county in which proceeding is filed. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878, 1950 Miss. LEXIS 234 (Miss. 1950).

Venue of a mandamus action by Hancock County to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison Counties, which had been taken over by the highway commission and had be-

come a part of United States Highway 90, was in Hinds County, where the state highway commission had its permanent

office. State ex rel. Cowan v. State Highway Com., 195 Miss. 657, 13 So. 2d 614, 1943 Miss. LEXIS 120 (Miss. 1943).

RESEARCH REFERENCES

ALR.

Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 A.L.R.4th 700.

CJS.

55 C.J.S., Mandamus § 392, 393.

Am. Jur.

52 Am. Jur. 2d, Mandamus § 371.

§§ 11-41-5 through 11-41-17. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-41-5. [Codes, 1871, § 1519; 1880, § 2544; 1892, § 2848; 1906, § 3233; Hemingway's 1917, § 2535; 1930, § 2350; 1942, § 1111]

§ 11-41-7. [Codes, 1871, § 1520; 1880, § 2545; 1892, § 2849; 1906, § 3234; Hemingway's 1917, § 2536; 1930, § 2351; 1942, § 1112; Am Laws, 1980, ch. 383, § 1]

§ 11-41-9. [Codes, 1871, § 1523; 1880, § 2546; 1892, § 2850; 1906, § 3235; Hemingway's 1917, § 2537; 1930, § 2352; 1942, § 1113]

§ 11-41-11. [Codes, 1871, § 1524; 1880, § 2547; 1892, § 2851; 1906, § 3236; Hemingway's 1917, § 2538; 1930, § 2353; 1942, § 1114]

§ 11-41-13. [Codes, 1880, § 2548; 1892, § 2852; 1906, § 3237; Hemingway's 1917, § 2539; 1930, § 2354; 1942, § 1115]

§ 11-41-15. [Codes 1871, § 1525; 1880, § 2549; 1892, § 2853; 1906, § 3238; Hemingway's 1917, § 2540; 1930, § 2355; 1942, § 1116]

§ 11-41-17. [Codes, 1871, § 1526; 1880, § 2550; 1892, § 2854; 1906, § 3239; Hemingway's 1917, § 2541; 1930, § 2356; 1942, § 1117]

Editor's Notes — Former § 11-41-5 related to what petition shall contain and summons.

Former § 11-41-7 related to the pleadings and proceedings.

Former § 11-41-9 related to the writ – how served.

Former § 11-41-11 related to obedience to the writ enforced.

Former § 11-41-13 related to orders in vacation – appeal and supersedeas.

Former § 11-41-15 related to an act order done by another in certain cases.

Former § 11-41-17 related to temporary orders.

§ 11-41-19. Mandamus in certain cases triable in vacation.

A proceeding by mandamus may be tried and determined in termtime or in vacation; and, if tried in vacation, all the provisions of law relating to the trial and proceedings in vacation of information in the nature of quo warranto shall apply.

HISTORY: Codes, 1880, § 2551; 1892, § 2855; 1906, § 3240; Hemingway's 1917, § 2542; 1930, § 2357; 1942, § 1118; Laws, 1980, ch. 383, § 2, eff from and after July 1, 1980.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In a mandamus proceeding, the supreme court on appeal may issue the writ. *State ex rel. Patterson v. Bd. of Supervisors*, 234 Miss. 26, 105 So. 2d 154, 1958 Miss. LEXIS 457 (Miss. 1958).

Where a case was begun as a vacation matter under this section [Code 1942, § 1118], the petitioner had complied with the provisions of Code 1942, § 1141, and the supreme court had reversed the case with direction that the lower court issue a writ of mandamus as prayed for in the petition, the circuit judge, after the mandate went down, had power to issue the writ of mandamus in vacation. *State ex rel. Patterson v. Bd. of Supervisors*, 234 Miss. 26, 105 So. 2d 154, 1958 Miss. LEXIS 457 (Miss. 1958).

Where the unsuccessful candidate brought mandamus proceeding against the circuit clerk for an order permitting the examination of ballot boxes and where the clerk filed a written agreement for a hearing during vacation, the holding of the hearing during vacation was not in error even though consent was not given by the successful candidate who intervened later in the hearing. *Lopez v. Hol-*

leman, 219 Miss. 822, 69 So. 2d 903, 1954 Miss. LEXIS 392 (Miss. 1954).

A bill for mandatory injunction directing board of veterinary examiners to issue a license to practice veterinary medicine, surgery and dentistry was the proper remedy to obtain review of the board's order denying application for license, since there was no adequate remedy at law either by certiorari or mandamus. *Board of Veterinary Examiners v. Sistrunk*, 218 Miss. 342, 67 So. 2d 378, 1953 Miss. LEXIS 550 (Miss. 1953).

Candidate is entitled to enforce right of examination of ballot boxes, conferred by Corrupt Practices Act, by mandamus to be heard and determined in vacation, since such right is one affecting public interest and not merely personal to the candidate seeking to exercise it. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

Writ of prohibition issued in vacation without notice by clerk of circuit court, on order of circuit judge of another district, forbidding supervisors to conduct election, held void and not to affect election. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

RESEARCH REFERENCES

Am. Jur.

52 Am. Jur. 2d, Mandamus § 477.

CJS.

55 C.J.S., Mandamus § 296.

§ 11-41-21. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 2856; 1906, § 3241; Hemingway's 1917, § 2543; 1930, § 2358; 1942, § 1119]

Editor's Notes — Former § 11-41-21 related to the applicability of mandamus to writs of prohibition.

CHAPTER 43.

HABEAS CORPUS

Sec.

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- 11-43-3. Chapter not to apply in certain cases — service of petition and writ on Attorney General in extradition cases.
- 11-43-5. Relator not discharged on account of defective proceedings.
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- 11-43-9. How obtained.
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- 11-43-17. Form and service of writ.
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- 11-43-21. May be served on Sunday.
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- 11-43-31. Penalty for disobedience of the writ.
- 11-43-33. The trial.
- 11-43-35. Temporary orders.
- 11-43-37. Return not conclusive.
- 11-43-39. Witnesses subpoenaed—affidavits of.
- 11-43-41. Record of proceedings.
- 11-43-43. Conclusiveness of judgment.
- 11-43-45. Sheriff to attend trial.
- 11-43-47. Costs in certain cases, and security for.
- 11-43-49. Defaulting witness dealt with.
- 11-43-51. Liabilities and rights of witnesses.
- 11-43-53. Appeal in habeas corpus.
- 11-43-55. Procedure on appeal from judgment on habeas corpus.

§ 11-43-1. To what cases the writ extends.

The writ of habeas corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto, except in the cases expressly excepted.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (1, 18); 1857, ch. 48, art. 2; 1871, § 1396; 1880, § 2519; 1892, § 2226; 1906, § 2445; Hemingway's 1917, § 2011; 1930, § 1914; 1942, § 2815.

Cross References — Constitutional provision on habeas corpus, see Miss. Const. Art. 3, § 21.

Remedial writs grantable by supreme and circuit judges and chancellors, see § 9-1-19.

Mississippi Capital Defense Litigation Act, see §§ 19-18-1 et seq.

Compensation of counsel in post-conviction relief cases involving the death penalty, see § 99-15-18.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1

et seq.

Mississippi Capital Post-Conviction Counsel Act, see §§ 99-39-101 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

ANALYSIS

1. Nature and function of writ.
2. Restraint or confinement, necessity of.
3. Persons entitled to maintain writ.
4. Custody of minors.
5. Custody of lunatics and other incompetents.
6. To obtain bail.
7. Grounds for habeas corpus.
8. Scope of inquiry.
9. Right of appeal.
10. Review.

1. Nature and function of writ.

The function of the habeas corpus court in Mississippi in criminal cases is to release a prisoner who is being unlawfully held or to grant him a bail bond which he can make; a habeas corpus writ cannot be used as a collateral method to prevent a trial on an indictment in this state, nor can the writ be used as a post-conviction remedy, or a method of appeal out of time. *Keller v. Romero*, 303 So. 2d 481, 1974 Miss. LEXIS 1444 (Miss. 1974).

A habeas corpus proceeding has but one purpose, that is to set at liberty persons illegally held, by entering an order discharging the prisoner, granting bail, or for the purpose of delivering a child to the rightful custody of persons who are properly entitled to the care and custody of the child. *State v. Ridinger*, 279 So. 2d 618, 1973 Miss. LEXIS 1480 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

A habeas corpus proceeding may not perform the function of an appeal unless the original judgment sentence was void. *State v. Ridinger*, 279 So. 2d 618, 1973 Miss. LEXIS 1480 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134,

1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

A habeas corpus proceeding cannot be used to effect an appeal to the Supreme Court. *State v. Ridinger*, 279 So. 2d 618, 1973 Miss. LEXIS 1480 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Where a petitioner had been convicted upon a plea of guilty, his remedy, if any, for the alleged violation of his constitutional rights by questioning him without prior advice as to the right of counsel and the right to remain silent, and failure to offer the services of an attorney at his preliminary hearing, was not by habeas corpus but rather by writ of error coram nobis. *Clayton v. State*, 254 So. 2d 874, 1971 Miss. LEXIS 1523 (Miss. 1971).

The Mississippi habeas corpus statutes strictly limit the application of that remedy to cases only involving such defects as may appear on the face of the judgment. *King v. Cook*, 287 F. Supp. 269, 1968 U.S. Dist. LEXIS 9484 (N.D. Miss. 1968).

Habeas corpus proceedings cannot be made to perform the function of a writ of error. *Jackson v. Waller*, 248 Miss. 166, 156 So. 2d 594, 1963 Miss. LEXIS 388, 1964 Miss. LEXIS 265 (Miss. 1963), modified, 248 Miss. 172, 160 So. 2d 184 (Miss. 1964).

Coram nobis, not habeas corpus, is the proper mode of examination of the legality of a conviction of crime. *Smith v. State*, 155 So. 2d 494 (Miss. 1963).

The only function of a writ of habeas corpus after a conviction of crime is to inquire into the jurisdiction of the convicting tribunal. *Smith v. State*, 155 So. 2d 494 (Miss. 1963).

The Mississippi statutes relating to habeas corpus, and those relating to interstate rendition, are "not applicable to interstate extradition except to the extent that they may be in aid of, and not inconsistent with, the Constitution and laws of the United States on the question." *Loper v. Dees*, 210 Miss. 402, 49 So. 2d 718, 1951 Miss. LEXIS 274 (Miss. 1951).

In habeas corpus proceedings questioning the sufficiency of a requisition for extradition, the admission by appellant of his indictment and conviction for rape in a sister state cures the defect of the omission of indictment or judgment of conviction being attached to the demanding papers from the governor of sister state. *Loper v. Dees*, 210 Miss. 402, 49 So. 2d 718, 1951 Miss. LEXIS 274 (Miss. 1951).

A telegram from another state is an adequate basis for a provisional arrest and detention of a fugitive from justice from that state and the provisional detention pending the obtaining of extradition papers is reasonable and proper. *Loper v. Dees*, 210 Miss. 402, 49 So. 2d 718, 1951 Miss. LEXIS 274 (Miss. 1951).

Habeas corpus cannot perform function of an appeal from criminal prosecution which is not absolutely void. *McLemore v. Love*, 197 Miss. 273, 19 So. 2d 828, 1944 Miss. LEXIS 296 (Miss. 1944).

Habeas corpus cannot perform functions of writ of error or appeal. *Kelly v. Douglas*, 164 Miss. 153, 144 So. 237, 1932 Miss. LEXIS 238 (Miss. 1932).

Adverse judgment of county court, on motion in arrest of judgment, in criminal case, on ground verdict, judgment, and sentence were void for uncertainty, could be reviewed only on appeal, and not by habeas corpus. *Kelly v. Douglas*, 164 Miss. 153, 144 So. 237, 1932 Miss. LEXIS 238 (Miss. 1932).

A proceeding to enforce the right of personal liberty by means of a writ of habeas corpus is civil and not criminal. *State v. Gordon*, 105 Miss. 454, 62 So. 431, 1913 Miss. LEXIS 231 (Miss. 1913).

2. Restraint or confinement, necessary of.

A habeas corpus petition which was filed by a work-releasee who was reincarcerated would be dismissed where the

prisoner had been discharged from prison during the pendency of the appeal; nor were the prisoner's wife or employer entitled to relief under this section. *Bradley v. State*, 355 So. 2d 675, 1978 Miss. LEXIS 1993 (Miss. 1978).

A petitioner is not entitled to a writ of habeas corpus while released on bond. *Keller v. Romero*, 303 So. 2d 481, 1974 Miss. LEXIS 1444 (Miss. 1974).

The foundation of the writ of habeas corpus in any court is the allegation that the relator is detained in custody; accordingly, one released on bail is not considered to be restrained of his liberty so as to entitle him to a writ of habeas corpus. *Ex parte Walker*, 53 Miss. 366, 1876 Miss. LEXIS 81 (Miss. 1876).

3. Persons entitled to maintain writ.

Inmate did not argue that he was being illegally confined, detained, or deprived of his liberty; he merely argued that the parole board failed to give him a meaningful parole hearing. However, in Mississippi, prisoners had no constitutionally recognized liberty interest in parole, and because the inmate's petition was merely a request for parole, his petition was not a writ of habeas corpus and he was not entitled to a hearing. *Johnson v. Miller*, 919 So. 2d 273, 2005 Miss. App. LEXIS 430 (Miss. Ct. App. 2005).

A habeas corpus petition which was filed by a work-releasee who was reincarcerated would be dismissed where the prisoner had been discharged from prison during the pendency of the appeal; nor were the prisoner's wife or employer entitled to relief under this section. *Bradley v. State*, 355 So. 2d 675, 1978 Miss. LEXIS 1993 (Miss. 1978).

A defendant having failed to take an appeal from the judgment and sentence under which he stands committed, the habeas corpus court could not, in Mississippi, consider his complaint attacking the irregularities allegedly amounting to want of due process in the proceedings by which he was convicted and sentenced. *Harvey v. Mississippi*, 340 F.2d 263, 1965 U.S. App. LEXIS 6900 (5th Cir. Miss. 1965).

Where the jail sentence of accused, who had been convicted of two separate

charges of trespass and one of assault and battery, was suspended during good behavior, an appeal would not lie from the trial judge's action revoking the suspension and committing the accused to jail following a finding that accused, without justification, had assaulted another person; neither was the accused entitled to relief by invoking habeas corpus. *Blount v. Blount*, 231 Miss. 398, 95 So. 2d 545, 96 So. 2d 232, 97 So. 2d 240, 1957 Miss. LEXIS 525, 1957 Miss. LEXIS 526, 1957 Miss. LEXIS 527 (Miss. 1957).

A sheriff can maintain habeas corpus to recover custody of a prisoner under an order of the court having jurisdiction of the offense. *Wray v. Kelly*, 98 Miss. 172, 53 So. 492, 1910 Miss. LEXIS 49 (Miss. 1910).

A defendant charged with a misdemeanor who has been bound over to the circuit court by a committing magistrate and imprisoned for default in making the required bond cannot maintain a writ of habeas corpus to secure a remand of his case to the magistrate for trial. *Ex parte Smith*, 79 Miss. 373, 30 So. 710, 1901 Miss. LEXIS 67 (Miss. 1901).

Where a convict sues out a writ and escapes before the hearing, the writ should be dismissed. *Hamilton v. Flowers*, 57 Miss. 14, 1879 Miss. LEXIS 3 (Miss. 1879).

Persons discharged on bail will not be considered as restrained of their liberty so as to be entitled to a writ of habeas corpus. *Ex parte Walker*, 53 Miss. 366, 1876 Miss. LEXIS 81 (Miss. 1876).

4. Custody of minors.

In a child custody proceeding brought by the mother pursuant to § 93-11-65, the trial court's error in dismissing the mother's action was harmless where the court immediately held a full hearing on the father's petition for a writ of habeas corpus, which hearing was the same as would have been held under the mother's original suit; the trial court had jurisdiction to hear the mother's suit alleging a change of circumstances, where the Alabama court that had granted custody to the father had the right to modify the terms of the decree. Further, the trial court had complete jurisdiction to hear a child custody matter

in a habeas corpus proceeding under this section. *Brashers v. Green*, 377 So. 2d 597, 1979 Miss. LEXIS 2523 (Miss. 1979).

Where a mother of a child filed a sworn consent to the adoption of her child but her husband was not made a party to the adoption proceedings nor summoned because he told the attorneys that he was not the father of the child, in view of the presumption the a child born in wedlock is a legitimate child, the husband was a necessary party to the adoption proceedings in order for the court to decree an adoption of the child, and therefore, the decree of adoption was a nullity and could be attacked collaterally in a habeas corpus proceeding. *Krohn v. Miguez*, 274 So. 2d 654, 1973 Miss. LEXIS 1598 (Miss. 1973).

A father, awarded custody of minor children in a divorce action, who subsequently made an arrangement with his former wife to care for the children during the time he was employed in another state, could not thereafter successfully contend in a habeas corpus proceeding that the children were wrongfully withheld from him. *Fulton v. Fulton*, 218 So. 2d 866, 1969 Miss. LEXIS 1626 (Miss. 1969).

A habeas corpus proceeding is brought in a special court convened to try a single cause, whose powers wholly cease upon rendition of a final judgment. Such court, therefore, may not make a child custody order. *Talley v. Womack*, 249 Miss. 773, 163 So. 2d 742, 1964 Miss. LEXIS 434 (Miss. 1964).

On rendition of a final judgment the functions and powers of a habeas corpus court wholly cease, and it may not thereafter modify a judgment of a court of a sister state so as to divide the custody of a child between contending parents. *Talley v. Womack*, 249 Miss. 773, 163 So. 2d 742, 1964 Miss. LEXIS 434 (Miss. 1964).

In a habeas corpus proceeding instituted by a mother in a court other than one which had granted her custody of the children in a divorce proceeding, to obtain custody of the children from a paternal aunt and paternal grandparents, who were not parties to the divorce action, the prior decree of custody was not binding upon proof of circumstances and conditions arising since the date of its rendition, showing that the mother was unfit to

exercise such right or had forfeited it. *Neal v. Neal*, 238 Miss. 572, 119 So. 2d 273, 1960 Miss. LEXIS 440 (Miss. 1960).

The venue of a habeas corpus proceeding by a mother seeking custody of her children is necessarily in the county where the children are being allegedly unlawfully detained, by the persons not parties to the earlier divorce action, and who were defending against the mother's petition. *Neal v. Neal*, 238 Miss. 572, 119 So. 2d 273, 1960 Miss. LEXIS 440 (Miss. 1960).

In a contest between the paternal and maternal grandmothers over the custody of two children of the ages of 12 and 13 years, where it was shown that the paternal grandmother had made a good mother during the time she had had the care and custody of the children for approximately ten years, and that neither the maternal grandmother nor the mother had contributed anything to the support of the children during this period, and the children testified that they wanted to live with the paternal grandmother, the paternal grandmother was entitled to their custody. *Gladney v. Hopkins*, 233 Miss. 342, 102 So. 2d 181, 1958 Miss. LEXIS 389 (Miss. 1958).

Where paternal grandparents in whose custody the mother had placed child when mother was required to work to support herself and children, conceded in trial court that father was not necessary party to habeas corpus proceedings brought against them by the mother, the paternal grandparents on appeal could not contend that the father was a necessary party. *Newman v. Young*, 215 Miss. 467, 61 So. 2d 296, 1952 Miss. LEXIS 587 (Miss. 1952).

The chancery court in granting a divorce is authorized to make such orders touching the care, custody and maintenance of the children of the marriage as may seem equitable and just and where the chancery court makes no order of custody, the county court has jurisdiction to issue writ of habeas corpus and to determine the rightful custody of the minor. *Payne v. Payne*, 58 So. 2d 377 (Miss. 1952).

Natural parents of adopted child are not in position to make collateral attack by

habeas corpus proceedings on adoption decree on ground of fraud when they were parties to petition of adoption and were fully advised of all facts relied upon by adopting parents to obtain decree. *Welch v. Welch*, 208 Miss. 726, 45 So. 2d 353, 1950 Miss. LEXIS 291 (Miss. 1950).

In habeas corpus suit brought by mother to obtain custody of two children from father, custody having previously been granted mother by decree of different chancery court, habeas corpus proceeding is not available to father as a device to amend existing decree. *Hinman v. Craft*, 204 Miss. 568, 37 So. 2d 770, 1948 Miss. LEXIS 390 (Miss. 1948).

Maternal grandparents were entitled to retain custody, until further order of court, of eleven months' old child whose mother had died and whose father was in the army, as against the paternal grandparents on father's application, where the child was sick and had lived all his life with the maternal grandparents who had done everything in their power to conserve his well-being. *Clark v. Davis*, 197 Miss. 135, 19 So. 2d 500, 1944 Miss. LEXIS 283 (Miss. 1944).

On death of father, mother has right to custody of her child as against any other person unless she has forfeited her right by abandonment or immoral conduct. *Stegall v. Stegall*, 151 Miss. 875, 119 So. 802, 1929 Miss. LEXIS 249 (Miss. 1929).

In a contest between mother and father as to the custody of a child, the welfare of the child is the paramount consideration of the court. *Haynie v. Hudgins*, 122 Miss. 838, 85 So. 99, 1920 Miss. LEXIS 481 (Miss. 1920).

An instance where the mother is entitled to custody of her child in preference to the child's grandmother. *Kinnaird v. Lowry*, 102 Miss. 557, 59 So. 843, 1912 Miss. LEXIS 88 (Miss. 1912).

Where neither parent was shown fit to have custody of two-year-old child after divorce the court property awarded temporary custody to the mother. *O'Neal v. O'Neal*, 95 Miss. 415, 48 So. 623, 1909 Miss. LEXIS 232 (Miss. 1909).

On habeas corpus by a father for his child in the custody of collateral relatives, it will be presumed to be for the best interest of the child to be with the father

unless his unfitness or abandonment of the child be shown. *Hibbette v. Baines*, 78 Miss. 695, 29 So. 80, 1900 Miss. LEXIS 129 (Miss. 1900).

Where the petition alleges that the rightful custody of certain children is withheld by the defendant from petitioner and the sheriff's return on the writ of habeas corpus shows that they are not found, the court should not, in their absence, entertain objections to the petition or proceed further with the hearing of the case. A writ should be issued requiring the defendant to produce the children or show that he cannot do so. *Board of Sup'rs. v. Leigh*, 69 Miss. 754, 13 So. 854, 1892 Miss. LEXIS 51 (Miss. 1892).

Where the board of supervisors makes an order authorizing one of its members to procure a home for certain poor orphans in the county and their custody is withheld from him, he may by habeas corpus obtain the custody of the children that they may be dealt with according to law. *Board of Sup'rs. v. Leigh*, 69 Miss. 754, 13 So. 854, 1892 Miss. LEXIS 51 (Miss. 1892).

Though the father by abstract right be entitled to the custody of his children, yet such right is modified by the circumstances of each case and the court will be guided by the children's best interest. *McShan v. McShan*, 56 Miss. 413, 1879 Miss. LEXIS 139 (Miss. 1879).

A widowed mother is entitled to the custody of her thirteen-year-old son, notwithstanding he prefers remaining with a man of good character to whom his deceased father had contracted him. *Moore v. Christian*, 56 Miss. 408, 1879 Miss. LEXIS 138 (Miss. 1879).

In such case if the infant's condition would not be materially improved by the change sought for in the writ, it should be refused. *Cocke v. Hannum*, 39 Miss. 423, 1860 Miss. LEXIS 71 (Miss. 1860); *Maples v. Maples*, 49 Miss. 393, 1873 Miss. LEXIS 128 (Miss. 1873), overruled, *Moore v. Christian*, 56 Miss. 408, 1879 Miss. LEXIS 138 (Miss. 1879).

On a writ by a guardian for the ward who has been forcibly taken from him by the mother if it appear that the ward's interest and inclinations would be consulted by remaining with the mother, the

court can rightfully refuse to restore the ward though the guardian have not abused the trust and be competent. *Foster v. Alston*, 7 Miss. 406, 1842 Miss. LEXIS 58 (Miss. 1842).

5. Custody of lunatics and other incompetents.

Sheriff of the county could not recover custody of one adjudged to be insane and committed to the care of the superintendent of the state insane hospital upon a *capias* for the arrest of such lunatic who was indicted for murder after his commitment to the insane hospital. *Mabry v. Hoyer*, 124 Miss. 144, 87 So. 4, 1920 Miss. LEXIS 536 (Miss. 1920).

6. To obtain bail.

Petition for habeas corpus challenged the denial of bail for petitioner's capital murder charge, but failed to challenge the detention for conspiracy to commit murder; because he was legally detained without bail on the conspiracy charge because he was a danger to his intended victim, Miss. Const. art. 3, § 29, cl. 3, he was not entitled to relief. *Smith v. Banks*, 134 So. 3d 715, 2014 Miss. LEXIS 67 (Miss. 2014).

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), § 99-35-115, Miss. Sup. Ct. R. 9 or Unif. Crim. R. Cir. Ct. Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure post-conviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal,

and statutory and uniform rule procedure another, although the standards for granting or denying bail remain the same in either situation. *Walker v. State*, 555 So. 2d 738, 1990 Miss. LEXIS 40 (Miss. 1990).

In habeas corpus to obtain bail of relator the state is a real party in interest and can appeal. *State v. Gordon*, 105 Miss. 454, 62 So. 431, 1913 Miss. LEXIS 231 (Miss. 1913).

In capital offenses where the proof leaves no reasonable doubt as to the guilt of the prisoner, bail as a matter of right is denied by law and can be rightfully granted only in exceptional and extraordinary circumstances such as protracted or unusual delay on the part of the state in bringing the prisoner to trial, or such as are likely to seriously or fatally affect the health of the prisoner by reason of imprisonment and the denial of bail. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241, 1887 Miss. LEXIS 26 (Miss. 1887).

Where there is a well-founded doubt of the guilt of a prisoner it cannot be said that the "proof is evident or that the presumption great" of his guilt, and where upon the evidence there is a probability of the prisoner's innocence there must be a reasonable doubt of his guilt. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241, 1887 Miss. LEXIS 26 (Miss. 1887).

7. Grounds for habeas corpus.

Trial court did not err by treating an inmate's writ of habeas corpus as a petition for post-conviction relief, as a habeas corpus writ was available only to protest a constitutionally-recognized liberty interest, and the interests of a person in the intensive supervision program did not rise to the level of constitutionally-cognized liberty interests. *Moore v. Miss. Dep't of Corr.*, 936 So. 2d 941, 2005 Miss. App. LEXIS 973 (Miss. Ct. App. 2005), cert. denied, 2006 Miss. LEXIS 560 (Miss. Aug. 24, 2006).

Inmate's complaint filed with the circuit court for a review of the parole board's determinations was properly dismissed because the circuit court did not have the jurisdiction to grant or deny parole. Further, while the inmate had entitled his petition a habeas corpus action, because the parole board had complete discretion

to grant or deny parole, the inmate failed to state a claim that would have required an evidentiary hearing. *Johnson v. Miller*, 919 So. 2d 273, 2005 Miss. App. LEXIS 430 (Miss. Ct. App. 2005).

Issuance of writ in habeas corpus proceeding on grounds that defendant-petitioner had been denied right to appeal, was erroneous. *State v. Ridinger*, 279 So. 2d 618, 1973 Miss. LEXIS 1480 (Miss. 1973), but see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

A writ of habeas corpus is not a proper proceeding to test the sufficiency of the evidence to support an otherwise valid order revoking a suspension of sentence. *State v. Nicholson*, 286 So. 2d 820, 1973 Miss. LEXIS 1323 (Miss. 1973).

Habeas corpus proceedings cannot be used as a vehicle to appeal a case to the Supreme Court after time for an appeal has expired, unless the sentence is void on its face. *Royalty v. McAdory*, 278 So. 2d 464, 1973 Miss. LEXIS 1450 (Miss. 1973).

Where the judgment by which a person is confined is void, a writ of habeas corpus will issue to release such person. *Krohn v. Miguez*, 274 So. 2d 654, 1973 Miss. LEXIS 1598 (Miss. 1973).

Only such defects as may appear on the face of the judgment may be made the basis of an attack by habeas corpus under the laws of Mississippi. *Harvey v. Mississippi*, 340 F.2d 263, 1965 U.S. App. LEXIS 6900 (5th Cir. Miss. 1965).

The writ may be invoked for the purpose of determining the legality of a revocation of a suspension of sentence. *Jackson v. Waller*, 248 Miss. 166, 156 So. 2d 594, 1963 Miss. LEXIS 388, 1964 Miss. LEXIS 265 (Miss. 1963), modified, 248 Miss. 172, 160 So. 2d 184 (Miss. 1964).

Persons arrested for violating ordinances by parading without a permit, in an anti-segregation demonstration, held not entitled to habeas corpus in federal court on ground that mass arrests had so loaded state courts as to deprive them of an adequate remedy under state law. *Brown v. Rayfield*, 320 F.2d 96, 1963 U.S. App. LEXIS 4762 (5th Cir. Miss.), cert. denied, 375 U.S. 902, 84 S. Ct. 191, 11 L.

Ed. 2d 143, 1963 U.S. LEXIS 255 (U.S. 1963).

That one convicted on a plea of guilty may not appeal does not entitle him to habeas corpus upon the ground that the plea was fraudulently obtained; his remedy is by writ of coram nobis. *Rogers v. Jones*, 240 Miss. 610, 128 So. 2d 547, 1961 Miss. LEXIS 491 (Miss. 1961).

Aggrieved party may resort to habeas corpus to review judgment or proceedings void on their face and subject to collateral attack. *Kelly v. Douglas*, 164 Miss. 153, 144 So. 237, 1932 Miss. LEXIS 238 (Miss. 1932).

Order of the court setting aside verdict of acquittal and remanding accused into custody was beyond its jurisdiction, depriving person of liberty, and relief by habeas corpus was proper. *State v. Chambliss*, 142 Miss. 256, 107 So. 200, 1926 Miss. LEXIS 62 (Miss. 1926).

An erroneous judgment of the court will not entitle the defendant to discharge under habeas corpus. *Ex parte Burden*, 92 Miss. 14, 45 So. 1, 1907 Miss. LEXIS 5 (Miss. 1907).

Accused, convicted on affidavit charging no crime, is entitled to be discharged on a writ of habeas corpus. *Ex parte Weems*, 96 Miss. 635, 51 So. 2, 1910 Miss. LEXIS 157 (Miss. 1910); *Ex parte Harris*, 85 Miss. 4, 37 So. 505, 1904 Miss. LEXIS 103 (Miss. 1904).

A defendant who has been convicted of a misdemeanor before a justice of the peace will not be released from custody on a writ of habeas corpus because of defects in the affidavit upon which the conviction was based. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708, 1901 Miss. LEXIS 64 (Miss. 1901).

Although mere irregularities or reversible errors in the proceedings before the conviction cannot be availed of by habeas corpus, it is otherwise if it be plainly manifest of record that because of radical and incurable defects, the verdict and judgment are nullities. *Ex parte Scott*, 70 Miss. 247, 11 So. 657, 1892 Miss. LEXIS 65 (Miss. 1892).

While the accused is entitled to relief by habeas corpus as against such a judgment, he will not be discharged, but will be held for another trial on the same

indictment. *Ex parte Scott*, 70 Miss. 247, 11 So. 657, 1892 Miss. LEXIS 65 (Miss. 1892).

The judgment of the circuit court adjudging an indictment sufficient constitutes the law of the case until reversed on appeal. *Emanuel v. State*, 36 Miss. 627, 1859 Miss. LEXIS 75 (Miss. 1859).

8. Scope of inquiry.

A habeas corpus proceeding is neither a method of appeal, a method of deciding the sufficiency of evidence introduced before a trial court, a postconviction remedy nor a means of obtaining a new trial; and so long as the trial court had jurisdiction under a valid law and rendered a valid judgment, a petitioner is not entitled to release on a writ of habeas corpus. *Ray v. State*, 229 So. 2d 579, 1969 Miss. LEXIS 1253 (Miss. 1969).

In habeas corpus proceedings to determine the validity to revoke suspension of sentence, where evidence showed a breach of condition of good behavior under which the sentences were suspended, it was not necessary to show guilt beyond a reasonable doubt. *Crabb v. State*, 55 So. 2d 485 (Miss. 1951).

A writ of habeas corpus cannot be made to perform the functions of a writ of error or an appeal, and a person in custody under a judgment or order of a court of competent jurisdiction cannot obtain his discharge on habeas corpus on account of errors or irregularities, however gross, in the judgment or in the proceedings on which the judgment was founded. *Ex parte Chain*, 210 Miss. 415, 49 So. 2d 722, 1951 Miss. LEXIS 275 (Miss. 1951).

In reviewing conviction of crime by habeas corpus proceeding, all doubts must be resolved in favor of integrity, competence, and proper performance of their official duties by judge and state attorney. *Miller v. State*, 207 Miss. 156, 41 So. 2d 375, 1949 Miss. LEXIS 325 (Miss.), cert. denied, 338 U.S. 844, 70 S. Ct. 93, 94 L. Ed. 516, 1949 U.S. LEXIS 1837 (U.S. 1949).

Where child was brought into this state and was in the custody of its father, who asserted that the mother had abandoned the child and that although the mother was awarded custody by a foreign decree

of divorce, she had become unfit to have custody, court had jurisdiction to inquire into the merits of the controversy. *Haynie v. Hudgins*, 122 Miss. 838, 85 So. 99, 1920 Miss. LEXIS 481 (Miss. 1920).

On appeal from requirement of an excessive bail bond, health of defendant and ability to give bond are to be considered. *Ex parte Goldsby*, 121 Miss. 479, 83 So. 673, 1920 Miss. LEXIS 93 (Miss. 1920).

Guilt or innocence not inquired into. *State v. Morgan*, 114 Miss. 634, 75 So. 441, 1917 Miss. LEXIS 72 (Miss. 1917).

If it be claimed that the prisoner is detained under a sentence by a justice of the peace, he may deny the existence of the sentence, the jurisdiction of the justice or the constitutionality of the law under which he was prosecuted, but he cannot go into the evidence upon which he was convicted. *Donnell v. State*, 48 Miss. 661, 1873 Miss. LEXIS 89 (Miss. 1873).

9. Right of appeal.

The state, though not formally designated as such, is always a real party to the record in habeas corpus proceedings, where the petitioner is being held to await trial for an alleged violation of the criminal law, and is therefore entitled to an appeal from a judgment adverse to its interest. *State v. Gordon*, 105 Miss. 454, 62 So. 431, 1913 Miss. LEXIS 231 (Miss. 1913).

If on the hearing of the writ the relator be awarded his liberty upon the execution of the bond and he give the bond, he is not restrained of his liberty and he cannot

appeal. *Ex parte Walker*, 53 Miss. 366, 1876 Miss. LEXIS 81 (Miss. 1876).

10. Review.

Appellant's claim for excessive detention while awaiting a revocation hearing was procedurally barred because appellant should have either filed a habeas petition or a motion for relief, and his failure to do so resulted in the issue never being presented to the circuit court and, therefore, it was procedurally barred on appeal. *Edmonson v. State*, 238 So. 3d 1218, 2018 Miss. App. LEXIS 101 (Miss. Ct. App. 2018).

There must be evidence to support the finding of a chancellor on habeas corpus. *Ex parte Jackson*, 63 So. 571 (Miss. 1913).

A chancellor's finding on facts in a habeas corpus trial is conclusive on appeal. *Robinson v. Yazoo & M. V. R. Co.*, 58 So. 539 (Miss. 1912); *Ex parte Semmes*, 60 So. 1016 (Miss. 1913).

The judicial officer who hears an application for bail is the trier of the facts and must determine on his own judgment and conscience whether the evidence under the law warrants bail or not, but in doing so he is governed by the established rules of law and the supreme court, when called upon to review a judgment denying bail, is governed by the same rules of law which control the action of the officer below, giving to his judgment however the prima facie presumption of correctness which attaches to the judgments of all courts of competent jurisdiction. *Ex parte Hamilton*, 65 Miss. 147, 3 So. 241, 1887 Miss. LEXIS 26 (Miss. 1887).

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corpus, on personal service as having been obtained by fraud or trickery. 98 A.L.R.2d 600.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus. 4 A.L.R.3d 1277.

Scope and extent, and remedy or sanctions for infringement, of accused's right to communicate with his attorney. 5 A.L.R.3d 1360.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities. 8 A.L.R.3d 301.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 A.L.R.3d 764.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 A.L.R.3d 16.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus — modern cases. 26 A.L.R.4th 455.

Availability of federal habeas corpus relief, under 28 USCS §§ 2241 and 2254, in child custody cases. 49 A.L.R. Fed. 674.

Availability of postconviction relief under 28 USCS § 2254 based on alleged governmental violation of Interstate Agreement on Detainers Act (18 USCS Appx). 63 A.L.R. Fed. 155.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 11 et seq.

13 Am. Jur. Pl & Pr Forms (Rev), Habeas Corpus, Form 113.4 (Petition or application — By state prisoner — Denial of assistance of counsel).

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

41 Am. Jur. Trials 349, Habeas Corpus: Pretrial Motions.

CJS.

39 C.J.S., Habeas Corpus §§ 13–20, 42–44, 49–54 et seq.

Lawyers' Edition.

When is person “in custody” in violation of Federal Constitution, so as to be eligible for relief under federal habeas corpus legislation — Supreme Court cases. 104 L. Ed. 2d 1122.

Law Reviews.

Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue — Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-3. Chapter not to apply in certain cases — service of petition and writ on Attorney General in extradition cases.

Nothing in this chapter shall authorize the discharge of any person convicted of an offense, or charged with an offense committed in any other part of the United States, and who, agreeably to the Constitution of the United States or the laws of the state, ought to be delivered up to the executive power of the state or territory where the offense is charged to have been committed; nor of any person suffering imprisonment under lawful judgment.

This chapter shall not apply to any collateral relief sought by any person following his conviction of a crime. Such relief shall be governed by the procedures prescribed in the Mississippi Uniform Post-Conviction Collateral Relief Act.

Provided, in any suit filed seeking the release of any person being held for extradition to any other part of the United States, its territories or foreign countries or any suit filed hereunder seeking the release of any person ordered extradicted, a copy of the petition and writ shall be served upon the Attorney

General not less than three (3) days before the date and time set for hearing thereon.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (15); 1857, ch. 48, art. 3; 1871, § 1397; 1880, § 2520; 1892, § 2227; 1906, § 2446; Hemingway's 1917, § 2012; 1930, § 1915; 1942, § 2816; Laws, 1966, ch. 365, § 1; Laws, 1984, ch. 378, § 16, eff from and after passage (approved April 17, 1984).

Cross References — Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Validity of judgment.
3. Contempt cases.
4. Extradition proceedings.
5. —Scope of inquiry.
6. Service of notice on attorney general.

1. In general.

One who has been denied bail may seek his or her liberty via habeas corpus. There is nothing in the Uniform Post-Conviction Collateral Relief Act (§§ 99-39-1 et seq.), § 99-35-115, Miss. Sup. Ct. R. 9 or Unif. Crim. R. Cir. Ct. Prac. 7.02 which purports to suspend this right nor could the right ever be suspended except in the limited circumstance provided for by the constitution. Although purely collateral post-conviction remedies attacking a judgment of conviction or sentence should be sought under authority of the Post-Conviction Collateral Relief Act since that Act, in the pure post-conviction collateral relief sense, is arguably "post-conviction habeas corpus renamed," matters of appeal may appropriately be addressed through true habeas corpus actions; bail pending appeal via habeas corpus is incident to the direct review of a conviction or sentence and, therefore, is not affected, prohibited or otherwise governed by the Uniform Post-Conviction Collateral Relief Act. Habeas corpus is one way of seeking liberty following conviction and pending appeal, and statutory and uniform rule procedure another, although the standards for grant-

ing or denying bail remain the same in either situation. *Walker v. State*, 555 So. 2d 738, 1990 Miss. LEXIS 40 (Miss. 1990).

Habeas corpus will not lie to release a prisoner held under a lawful sentence. *Allred v. State*, 187 So. 2d 28, 1966 Miss. LEXIS 1340 (Miss. 1966).

That one convicted on a plea of guilty may not appeal does not entitle him to habeas corpus upon the ground that the plea was fraudulently obtained; his remedy is by writ of coram nobis. *Rogers v. Jones*, 240 Miss. 610, 128 So. 2d 547, 1961 Miss. LEXIS 491 (Miss. 1961).

A writ of habeas corpus cannot be made to perform the functions of a writ of error or an appeal, and a person in custody under a judgment or order of a court of competent jurisdiction cannot obtain his discharge on habeas corpus on account of errors or irregularities, however gross, in the judgment or in the proceedings on which the judgment was founded. *Ex parte Chain*, 210 Miss. 415, 49 So. 2d 722, 1951 Miss. LEXIS 275 (Miss. 1951).

A defendant charged with a misdemeanor who has been bound over to the circuit court by a committing magistrate and imprisoned for default in making the required bond cannot maintain a writ of habeas corpus to secure a remand of his case to the magistrate for trial. *Ex parte Smith*, 79 Miss. 373, 30 So. 710, 1901 Miss. LEXIS 67 (Miss. 1901).

A convict held after serving out his term for the cost of his prosecution can be discharged on habeas corpus. *Ex parte*

Meyer, 57 Miss. 85, 1879 Miss. LEXIS 18 (Miss. 1879).

The statute, however, does not contemplate detention of a convict to serve out the costs of his defense. *Ex parte Meyer*, 57 Miss. 85, 1879 Miss. LEXIS 18 (Miss. 1879).

2. Validity of judgment.

In this state a writ of habeas corpus has the principal function of testing the legality of a petitioner's detention prior to his conviction, and may be utilized as a post-conviction remedy to release a petitioner from imprisonment only where the petitioner was convicted under an invalid statute or by a court lacking jurisdiction. However, where a petition is filed seeking post-conviction relief, the court should look through the form and to the substance of the petition, and where a case for relief under a writ of error coram nobis is stated, the court should treat it accordingly. *Nelson v. Tullis*, 323 So. 2d 539, 1975 Miss. LEXIS 1565 (Miss. 1975).

A petitioner is not entitled to be released on a writ of habeas corpus so long as the trial court has jurisdiction under a valid law and renders a valid judgment, and this is true even when the defendant is innocent. *Ledbetter v. Bishop*, 210 So. 2d 880, 1968 Miss. LEXIS 1531 (Miss. 1968).

Habeas corpus was not available to procure petitioner's release from penitentiary on ground that his conviction of grand larceny for theft of automobile tires was void because the indictment did not state the value of the property alleged to have been stolen or that it constituted personal property, where these questions were raised for the first time on motion for new trial, and the appeal from conviction was dismissed for lack of prosecution, since the alleged errors, even if sustainable, did not render the conviction void. *McLemore v. Love*, 197 Miss. 273, 19 So. 2d 828, 1944 Miss. LEXIS 296 (Miss. 1944).

Conviction before a justice, disqualified by interest, held not void and not ground for habeas corpus. *Hays v. Barnes*, 148 Miss. 599, 114 So. 395, 1927 Miss. LEXIS 51 (Miss. 1927).

A defendant who has been convicted before a justice of the peace will not be

released from custody on a writ of habeas corpus because of defects in the affidavit upon which he was convicted. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708, 1901 Miss. LEXIS 64 (Miss. 1901).

A convict is entitled to be discharged from the judgment if the record of his conviction be so defective as to render his sentence a nullity. *Ex parte Phillips*, 57 Miss. 357, 1879 Miss. LEXIS 89 (Miss. 1879).

3. Contempt cases.

A judge cannot, on habeas corpus, discharge a prisoner who is in custody for contempt of another court. *Ex parte Adams*, 25 Miss. 883, 1853 Miss. LEXIS 35 (Miss. 1853); *Shattuck v. State*, 51 Miss. 50, 1875 Miss. LEXIS 10 (Miss. 1875).

4. Extradition proceedings.

State statutes and decisions relating to habeas corpus and extradition are not applicable to interstate extradition except to extent that they may be in aid of, and not inconsistent with, the constitution and laws of United States on the question. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

Conclusion of governor of asylum state as to existence of jurisdictional prerequisites to surrender of an alleged offender to the authorities of the demanding state, that he has been furnished with a copy of an indictment found by a grand jury or an affidavit made before a magistrate of the demanding state or territory, charging the person demanded with the commission of the alleged crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, and that he is satisfied that such alleged offender is a fugitive from justice of the demanding state, is subject to judicial review on habeas corpus. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

Decree of court in habeas corpus proceedings adjudging extradition proceedings to be insufficient both in form and substance but providing for discharge of relator unless within a stated period of time the sheriff should be served with a proper, legal and sufficient extradition warrant based upon proper, legal and suf-

ficient papers and proceedings, violated accused's constitutional right to have the trial judge as a judicial officer not only to pass upon the sufficiency of the extradition proceedings then before the court but also the sufficiency of any such papers that were to be thereafter supplied in their stead. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

The issuance of a warrant makes a prima facie case in an extradition proceeding under habeas corpus. *Ex parte Walters*, 106 Miss. 439, 64 So. 2, 1913 Miss. LEXIS 151 (Miss. 1913).

On habeas corpus to test the validity of an arrest and imprisonment under extradition proceedings, petitioner is not entitled to be liberated on bail, although the offense charged is bailable in the jurisdiction where it was committed. *Ex parte Edwards*, 91 Miss. 621, 44 So. 827, 1907 Miss. LEXIS 153 (Miss. 1907).

A person indicted for murder in another state, in which such offense is not bailable, and who has been arrested in this state on a warrant issued by the governor upon requisition from the chief executive of such other state, is not entitled to bail pending his appeal to the supreme court from a judgment remanding him to custody in a habeas corpus proceeding based upon the ground that he is not a fugitive from justice and was not in such other state when the crime was committed. *Ex parte Wall*, 84 Miss. 783, 38 So. 628, 1904 Miss. LEXIS 101 (Miss. 1904).

On question of right to bail, distinction pointed out between cases of arrest and examination for commitment to await extradition, demand and warrant on the one hand, and cases arising on habeas corpus after arrest on execution warrant for extradition on the other. *Ex parte Wall*, 84 Miss. 783, 38 So. 628, 1904 Miss. LEXIS 101 (Miss. 1904).

Upon habeas corpus, it is not cause of exception to the officer's return showing that the relator is held upon the warrant of the governor of this state for extradition for crime committed in another state, that it does not show an affidavit or indictment emanating from the authorities of the other state. The warrant of the governor is prima facie correctly issued and the return to be prima facie sufficient need not

show anything more. *Ex parte Devine*, 74 Miss. 715, 22 So. 3, 1897 Miss. LEXIS 73 (Miss. 1897), limited, *Ex parte Edwards*, 91 Miss. 621, 44 So. 827, 1907 Miss. LEXIS 153 (Miss. 1907); *Ex parte Scott*, 70 Miss. 247, 11 So. 657, 1892 Miss. LEXIS 65 (Miss. 1892).

5. —Scope of inquiry.

Upon judicial review on habeas corpus with respect to extradition of an alleged fugitive from justice of the demanding state, relator may introduce proof to show that he was not in the demanding state at the time of the commission of the alleged crime, and that he could not therefore be a fugitive from the justice of such state. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

If the governor's warrant of extradition and all of the requisition papers are sufficient in form and substance they may be introduced at the hearing on habeas corpus to constitute a prima facie right on the part of the respondent to surrender the alleged defendant to the demanding state, but relator may nevertheless introduce proof before the court where the habeas corpus petition is being heard to show that he was not in the demanding state at the time of the commission of the alleged crime. *Bishop v. Jones*, 207 Miss. 438, 42 So. 2d 421 (1949).

A defense on the merits of the case is not available under extradition proceedings. *Ex parte Edwards*, 91 Miss. 621, 44 So. 827, 1907 Miss. LEXIS 153 (Miss. 1907).

Where relator is arrested for crime committed in another state upon the warrant of the governor of this state authorizing extradition, the guilt or innocence of the relator cannot be inquired into on habeas corpus in this state. *Ex parte Devine*, 74 Miss. 715, 22 So. 3, 1897 Miss. LEXIS 73 (Miss. 1897), limited, *Ex parte Edwards*, 91 Miss. 621, 44 So. 827, 1907 Miss. LEXIS 153 (Miss. 1907).

6. Service of notice on attorney general.

When it is brought to the attention of the judge in a habeas corpus court that the attorney general has not been served with notice in accordance with Code 1942, § 2816, he may issue a temporary order

continuing the hearing until the attorney general of Mississippi has been given the notice required by this section. *Corkern v. State*, 269 So. 2d 630, 1972 Miss. LEXIS 1226 (Miss. 1972).

Noncompliance with the requirement that the attorney general be given notice as required by Code 1942, § 2816 does not deprive the judges named in Code 1942, § 2818 of jurisdiction to issue writs and

hear habeas corpus proceedings, for the only jurisdictional requirements are that a proper petition be presented to a qualified judge, and when the judge issues a habeas corpus writ it must be served upon the party defendant who is said to be unlawfully holding a prisoner, or depriving a person of his liberty. *Corkern v. State*, 269 So. 2d 630, 1972 Miss. LEXIS 1226 (Miss. 1972).

RESEARCH REFERENCES

ALR.

Right of one at large on bail to writ of habeas corpus. 77 A.L.R.2d 1307.

Parolee's right to habeas corpus. 92 A.L.R.2d 682.

Right of prisoner held under extradition warrant to raise question of identity in habeas corpus proceeding. 93 A.L.R.2d 916.

When is a person in custody of governmental authorities for purposes of exer-

cise of state remedy of habeas corpus — modern cases. 26 A.L.R.4th 455.

Am. Jur.

41 Am. Jur. Trials 349, Habeas Corpus: Pretrial Motions.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-5. Relator not discharged on account of defective proceedings.

If it appear on the trial of any habeas corpus that the relator is held by virtue of proceedings against him for crime which are invalid, the judge shall not discharge the relator because thereof, but shall investigate the facts; and if it be found that he ought to be held for any crime alleged against him, the judge shall not discharge him, but shall commit him or require bail, according to the nature of the case.

HISTORY: Codes, 1892, § 2228; 1906, § 2447; Hemingway's 1917, § 2013; 1930, § 1916; 1942, § 2817.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

Regardless of any constitutional rights that may have been violated, the habeas corpus court could not release the prisoner from his bond to appear in the circuit court and could not enjoin the district

attorney from prosecuting the petitioner for the charged offense. *Keller v. Romero*, 303 So. 2d 481, 1974 Miss. LEXIS 1444 (Miss. 1974).

Executing warrant for extradition prima facie evidence of facts recited.

Grace v. Dogan, 151 Miss. 267, 117 So. 596, 1928 Miss. LEXIS 303 (Miss. 1928).

In such case, evidence by alleged fugitive from justice of an alibi is not advisable. Grace v. Dogan, 151 Miss. 267, 117 So. 596, 1928 Miss. LEXIS 303 (Miss. 1928).

The finding of a justice of the peace acting as conservator of the peace is not conclusive in a habeas corpus proceeding. Ex parte Oliver, 127 Miss. 208, 89 So. 915, 1921 Miss. LEXIS 215 (Miss. 1921).

Notwithstanding the provisions of this section [Code 1942, § 2817], the party having custody of the prisoner must produce a detention warrant showing his authority to detain the prisoner before the court can inquire into whether or not there is a valid and unexecuted sentence

outstanding against the prisoner. Ex parte Moody, 104 Miss. 836, 61 So. 741, 1913 Miss. LEXIS 86 (Miss. 1913).

Where the trial court pronounced improper sentence under a lawful conviction on habeas corpus the relator should be remanded for proper sentence. Ex parte Burden, 92 Miss. 14, 45 So. 1, 1907 Miss. LEXIS 5 (Miss. 1907).

The section [Code 1942, § 2817] does not prevent a discharge on habeas corpus of a person in custody where the affidavit under which he is held charges no offense and it does not appear that he has been guilty of any crime. Ex parte Harris, 85 Miss. 4, 37 So. 505, 1904 Miss. LEXIS 103 (Miss. 1904); Ex parte Weems, 96 Miss. 635, 51 So. 2, 1910 Miss. LEXIS 157 (Miss. 1910).

RESEARCH REFERENCES

ALR.

Former jeopardy as ground for habeas corpus. 8 A.L.R.2d 285.

Determination of sufficiency of charge of crime. 40 A.L.R.2d 1151.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies § 34.

§ 11-43-7. By whom granted.

The writ of habeas corpus may be granted by a judge of the Supreme Court, or a judge of the circuit or chancery court, in term time or in vacation, returnable before himself or another judge.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (1); 1857, ch. 48, art. 1; 1871, § 1398; 1880, § 2521; 1892, § 2229; 1906, § 2448; Hemingway's 1917, § 2014; 1930, § 1917; 1942, § 2818.

Cross References — Granting of remedial writs by supreme and circuit judges and chancellors, see § 9-1-19.

Jurisdiction of Mississippi Supreme Court, see § 9-3-9.

Jurisdiction of chancery court in general, see § 9-5-81.

General enumeration of subjects of circuit court jurisdiction, see § 9-7-81.

Power of county court, see § 9-9-19.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Noncompliance with the requirement that the attorney general be given notice as required by Code 1942, § 2816 does not deprive the judges named in Code 1942, § 2818 of jurisdiction to issue writs and hear habeas corpus proceedings, for the only jurisdictional requirements are that a proper petition be presented to a qualified judge, and when the judge issues a habeas corpus writ it must be served upon the party defendant who is said to be unlawfully holding a prisoner, or depriving a person of his liberty. *Corkern v. State*, 269 So. 2d 630, 1972 Miss. LEXIS 1226 (Miss. 1972).

A petition seeking a writ of habeas corpus for the recovery of custody of minor children awarded to petitioner in a divorce action is not a chancery court proceeding

and should not be filed in the original divorce case; for a habeas corpus court is a separate court and is to be distinguished from the chancery court or the circuit court; and it is organized when a judge issues an order for a hearing on a writ of habeas corpus, returnable before himself or another judge. *Fulton v. Fulton*, 218 So. 2d 866, 1969 Miss. LEXIS 1626 (Miss. 1969).

The proper venue for an habeas corpus proceeding by a mother to obtain custody of her children from the father was in the county where the children resided in the custody of the father, rather than in the county where the decree, largely giving custody to the mother, was entered. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

In habeas corpus proceedings by grandmother who had obtained appointment as guardian of orphaned child without notice, evidence sustained award of custody to persons who, having lawfully taken child into their custody and assumed the obligations to her incident to the parental relation, stood in loco parentis to her. *Britt v. Allred*, 199 Miss. 786, 25 So. 2d 711, 1946 Miss. LEXIS 246 (Miss. 1946).

A county judge, passing upon an application in habeas corpus, acts not as a county court, but with all the power and authority of a circuit judge or chancellor, and an appeal may be taken direct to the supreme court under Code 1942, § 1149. *Cole v. Cole*, 194 Miss. 292, 12 So. 2d 425, 1943 Miss. LEXIS 71 (Miss. 1943).

Chancellor without authority in habeas corpus proceeding to admit person convicted of felony to bail pending appeal; this power being lodged in circuit and supreme courts and judges thereof. *Leggett v. Vannison*, 133 Miss. 22, 96 So. 518, 1923 Miss. LEXIS 106 (Miss. 1923).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 79-83.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-9. How obtained.

Application for a writ of habeas corpus shall be by petition, in writing, sworn to by the person for whose relief it is intended, or by someone in his behalf, describing where and by whom he is deprived of liberty, and the facts and circumstances of the restraint, with the ground relied on for relief; and the application shall be made to the judge or chancellor of the district in which the relator is imprisoned, unless good cause be shown in the petition to the contrary. However, any petition filed by an inmate of any training school or hospital attacking his commitment for a claimed denial of a fundamental constitutional right under the Constitution of the State of Mississippi or of the United States which would affect his commitment shall be filed in a court of the county from which he was committed. And, if filed in any other court, the judge of that court shall, if he grants the writ, make it returnable to a court of the county from which the relator was committed; and in the case of a person committed by a youth court, not less than five (5) days' notice prior to hearing shall be given to the county attorney or district attorney of the county of commitment.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (1); 1857, ch. 48, art. 1; 1871, § 1400; 1880, § 2522; 1892, § 2230; 1906, § 2449; Hemingway's 1917, § 2015; 1930, § 1918; 1942, § 2819; Laws, 1966, ch. 366, § 1; Laws, 1972, ch. 453, § 1; Laws, 1984, ch. 378, § 17, eff from and after passage (approved April 17, 1984).

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

Appellant's claim for excessive detention while awaiting a revocation hearing was procedurally barred because appellant should have either filed a habeas petition or a motion for relief, and his failure to do so resulted in the issue never being presented to the circuit court and, therefore, it was procedurally barred on appeal. *Edmonson v. State*, 238 So. 3d 1218, 2018 Miss. App. LEXIS 101 (Miss. Ct. App. 2018).

Trial court did not err by treating an inmate's writ of habeas corpus as a petition for post-conviction relief as the writ was not filed in the county where the inmate was detained as required by Miss. Code Ann. § 11-43-9. *Moore v. Miss. Dep't of Corr.*, 936 So. 2d 941, 2005 Miss. App.

LEXIS 973 (Miss. Ct. App. 2005), cert. denied, 2006 Miss. LEXIS 560 (Miss. Aug. 24, 2006).

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United

States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

An application for a writ of habeas corpus must be verified. *Corkern v. State*, 269 So. 2d 630, 1972 Miss. LEXIS 1226 (Miss. 1972).

Where the answer of the attorney general to a letter in the form of a petition for habeas corpus, filed by one who pleaded guilty to a criminal charge in Sharkey County and was being then held in the state penitentiary in Sunflower County, revealed that no petition for habeas corpus had been filed in either Sunflower County or Sharkey County, and where the petition was not verified by oath as required under the section [Code 1942, § 2819], the petition would be dismissed without prejudice. *Tucker v. Sneed*, 246 So. 2d 736, 1971 Miss. LEXIS 1427 (Miss. 1971).

The proper venue for an habeas corpus proceeding by a mother to obtain custody of her children from the father was in the

county where the children resided in the custody of the father, rather than in the county where the decree, largely giving custody to the mother, was entered. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

A petition to the supreme court for a writ of habeas corpus on grounds of illegal confinement is insufficient, in absence of attached affidavit and showing in petition of good cause for failure to apply to a judge or chancellor of district where the petitioner is imprisoned. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517, 1953 Miss. LEXIS 377 (Miss.), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367, 1953 U.S. LEXIS 1649 (U.S. 1953).

The function of supreme court is to review the lower court's action in disposing of an application for writ of habeas corpus and the issuance of writ should not be first requested of the supreme court. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517, 1953 Miss. LEXIS 377 (Miss.), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367, 1953 U.S. LEXIS 1649 (U.S. 1953).

Granting of writ of habeas corpus on application therefor is not mandatory. *Lewis v. State*, 153 Miss. 759, 121 So. 493, 1929 Miss. LEXIS 79 (Miss. 1929).

RESEARCH REFERENCES

ALR.

Parolee's right to habeas corpus. 92 A.L.R.2d 682.

When is a person in custody of governmental authorities for purposes of exercise of state remedy of habeas corpus—modern cases. 26 A.L.R.4th 455.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 88, , 129 et seq.

Application for writ, 13 Am. Jur. Pl & Pr Forms (Rev ed), Habeas Corpus, Forms 21-190.

39 Am. Jur. Trials, Historical Aspects

and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

CJS.

39 C.J.S., Habeas Corpus §§ 333-335 et seq.

Lawyers' Edition.

When is person "in custody" in violation of Federal Constitution, so as to be eligible for relief under federal habeas corpus legislation—Supreme Court cases. 104 L. Ed. 2d 1122.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-11. Refusal to grant writ.

If from the showing made by the petition for habeas corpus it be manifest

that the person by whom, or on whose behalf, it is presented is not entitled to any relief thereby, the judge or chancellor may refuse to grant the writ, indorsing on the application his reason therefor.

HISTORY: Codes, 1880, § 2536; 1892, § 2231; 1906, § 2450; Hemingway's 1917, § 2016; 1930, § 1919; 1942, § 2820.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

Circuit court was not required to hold an evidentiary hearing before denying appellant's petition for a writ of habeas corpus because no writ of habeas corpus was granted; neither the statutes nor the Uniform Rules of Circuit and County Court Practice mandate a hearing upon every petition for a writ of habeas corpus, but instead, both contemplate scenarios where the petition would be summarily dismissed on its face. *Johnson v. State*, 159 So. 3d 601, 2014 Miss. App. LEXIS 667 (Miss. Ct. App. 2014).

Habeas corpus is one of the procedures available to test and decide the rightful custody of minors and a Mississippi court on such a petition may conduct a full hearing to determine whether there has been a material change of circumstances and whether for the best interests of a minor child another state's decree of divorce and custody should be modified. Thus, in a habeas corpus proceeding instituted by a mother who had legal custody of her minor son pursuant to a Louisiana

decree, where the son was being held by the father, the chancery court properly conducted a full hearing to determine whether there had been a material change of circumstances affecting the welfare and best interests of the child and properly concluded that conditions in the mother's home warranted a change of custody from mother to father, thereby in effect modifying the Louisiana decree. *Garza v. Shoffner*, 386 So. 2d 397, 1980 Miss. LEXIS 2040 (Miss. 1980).

The function of supreme court is to review the lower court's action in disposing of an application for writ of habeas corpus and the issuance of writ should not be first requested of the supreme court. *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517, 1953 Miss. LEXIS 377 (Miss.), cert. denied, 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367, 1953 U.S. LEXIS 1649 (U.S. 1953).

Granting of writ of habeas corpus on application therefor is not mandatory. *Lewis v. State*, 153 Miss. 759, 121 So. 493, 1929 Miss. LEXIS 79 (Miss. 1929).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ , 31 et seq.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-13. Bail by the way may be required.

Where the application is by or on behalf of one detained on a criminal charge, the judge or chancellor, on granting the writ, may, in his discretion, require a bail bond by or on behalf of the person detained, conditioned that he shall not escape by the way. The judge or chancellor may fix the amount of such bail, and direct who shall approve the bond; but such bail bond shall not operate to discharge the relator from custody. Such bond shall be deposited by the judge or chancellor in the clerk's office of the court in which the case is triable. If the condition of the bond be broken, the proceedings thereon shall be as in case of other forfeited bonds or recognizances.

HISTORY: Codes, 1880, § 2537; 1892, § 2232; 1906, § 2451; Hemingway's 1917, § 2017; 1930, § 1920; 1942, § 2821.

Cross References — Appeal from judgment on habeas corpus, see § 11-43-55.

Question of bail, see §§ 99-5-31 to 99-5-35.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

ALR.

Admission of petitioner to bail pending determination of habeas corpus on merits. 56 A.L.R.2d 668.

CJS.

39 C.J.S., Habeas Corpus §§ 10, 223, 224, 226, 240 et seq.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-Conviction Remedies § 146.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-15. Writ issued by judge or clerk.

The judge granting the writ may order it to be issued by the Clerk of the Supreme Court, or of any circuit or chancery court, who shall immediately issue it on receiving the order; or, when not convenient to a clerk, the judge himself shall issue the writ. Any judge or chancellor who shall wilfully refuse or neglect to grant, or to issue and try, the writ of habeas corpus, when required by law to do so, shall be guilty of a high misdemeanor in office, and any clerk who shall not, when ordered, immediately issue the writ, and other process, shall be liable, on conviction thereof, to be removed from office; and the judge or clerk shall, in case of such neglect or refusal, be liable, civilly, to the party aggrieved.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (1, 13); 1857, ch. 48, arts. 4, 6; 1871, § 1401; 1880, § 2523; 1892, § 2233; 1906, § 2452; Hemingway's 1917, § 2018; 1930, § 1921; 1942, § 2822.

Cross References — Imposition of standard state assessment in addition to all court imposed fines or other penalties for any misdemeanor violation, see § 99-19-73.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 90, 138 et seq.

CJS.

39 C.J.S., Habeas Corpus §§ 5, 6, 13-20, 42-44, 49-54 et seq.

Law Reviews.

Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-17. Form and service of writ.

The writ may be in substance, as follows, to wit:

“The State of Mississippi, to _____:

“We command you to have the body of _____, by you detained, as it is said, before _____, a judge of our _____ court, at _____, forthwith (or on a given day), to do and receive what may be then and there considered concerning him. Witness my hand,” etc.

And it may be served by such person as the judge granting it may direct, or by the sheriff or any constable, and it shall be served by the delivery of a true copy thereof to the person to whom it is directed, if to be found. And if it be directed to a sheriff or other officer who cannot be found, it may be served by leaving a copy with any deputy or servant of the officer to whom it is directed, at the place where the prisoner or other person is detained; and it shall be returned with an indorsement of service as in other cases.

HISTORY: Codes, 1871, § 1402; 1880, § 2524; 1892, § 2234; 1906, § 2453; Hemingway’s 1917, § 2019; 1930, § 1922; 1942, § 2823.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Am. Jur.

Writ, notice, and service, 13 Am. Jur. Pl & Pr Forms (Rev ed), Habeas Corpus, Forms 201-223.

Law Reviews.

Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-19. Taking of person in certain cases.

When it shall be shown to the judge to whom application is made for the writ, that there is reasonable ground to apprehend that the person in whose behalf the writ is applied for will be concealed or removed so as not to be brought up with the writ, it shall be the duty of the judge to order or issue the writ directed to the sheriff or other officer or person designated to execute it, commanding him to take the body of the person to be relieved by the writ, and bring him forthwith before the judge, and to summon the person alleged to have illegally detained him; in which case the form of the writ shall be, in substance, as follows, to wit:

“The State of Mississippi.

“To the sheriff or any lawful officer of _____ county:

“We command you to take and have the body of _____ restrained of his liberty, it is said, by _____, before _____, a judge of our _____ court, at _____, forthwith, to do and receive what shall then be considered; and do you summon the said _____ to appear, then and there to show the cause of detaining said _____; and have you then and there this writ, with your proceedings indorsed thereon. Witness my hand,” etc.

The writ shall be executed according to its tenor and effect, and returned as other writs.

HISTORY: Codes, 1871, § 1403; 1880, § 2525; 1892, § 2235; 1906, § 2454; Hemingway’s 1917, § 2020; 1930, § 1923; 1942, § 2824.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-21. May be served on Sunday.

All writs of habeas corpus may be issued or served on Sunday in case of emergency.

HISTORY: Codes, 1892, § 2236; 1906, § 2455; Hemingway’s 1917, § 2021; 1930, § 1924; 1942, § 2825.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-23. Where and when returnable.

The writ of habeas corpus shall be returnable forthwith, or on a particular day within a reasonable time, and at a place to be named by the judge granting the writ. But when granted by a circuit judge or chancellor, on the application of any person in custody, before conviction upon a criminal charge under the laws of this state, the judge or chancellor shall cause the writ to be made returnable at a convenient place in the county in which the offense is alleged to have been committed, unless so doing will interfere with his holding of a term of court.

HISTORY: Codes, 1871, § 1404; 1880, § 2526; 1892, § 2237; 1906, § 2456; Hemingway's 1917, § 2022; 1930, § 1925; 1942, § 2826.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2826] providing that the writ be returnable within the county where the crime was committed unless it interferes with the holding of a term of court by the judge or chancellor granting it, is directory and not jurisdictional and is to be confined to causes in which the merits are to be gone into and witnesses examined as to the legality of the detention. Ex parte Patterson, 71

Miss. 675, 15 So. 794, 1893 Miss. LEXIS 86 (Miss. 1893).

Where one charged with murder is confined in the jail of a different county from that in which the homicide occurred and he resorts to habeas corpus to obtain bail because of ill health, the hearing may, and in case of his dangerous illness should, be in the county of his confinement. Ex parte Patterson, 71 Miss. 675, 15 So. 794, 1893 Miss. LEXIS 86 (Miss. 1893).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-conviction Remedies §§ 91, 141 et seq.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

CJS.

39 C.J.S., Habeas Corpus §§ 319, 320, 369 et seq.

§ 11-43-25. When person detaining another guilty of crime.

Whenever the judge or chancellor, on issuing a writ of habeas corpus, shall be satisfied, by affidavit or otherwise, that the person unlawfully depriving another of his liberty has committed a crime in connection with such unlawful act, he may embody in the writ a warrant for the arrest of such person and have him brought up for examination at the hearing of the habeas corpus; and being satisfied, on the trial and examination, of the guilt of such person, the judge or chancellor shall commit him, or order his release on bail, to appear before the proper court to answer the charge.

HISTORY: Codes, 1892, § 2238; 1906, § 2457; Hemingway's 1917, § 2023; 1930, § 1926; 1942, § 2827.

Cross References — Liability for arrest of innocent person made legally, see § 99-3-23.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-27. Production of the body.

Whenever any writ of habeas corpus shall be served upon the sheriff or any other person to whom the same may be directed, or who may be ordered summoned thereby, he shall bring, or permit the officer executing the writ to bring, the body of the prisoner or person detained in custody before the judge who is to try the same, at the time and place designated in the writ, or, in case of the absence of such judge, then before any other judge, and to make return or answer to said writ.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (2); 1857, ch. 48, art. 7; 1871, § 1406; 1880, § 2528; 1892, § 2239; 1906, § 2458; Hemingway's 1917, § 2024; 1930, § 1927; 1942, § 2828.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Post-Conviction Remedies § 96, 145.

Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

Law Reviews.

Habeas corpus: The "Great Writ" in

§ 11-43-29. What the return or answer shall contain.

The officer or other person upon whom a writ of habeas corpus shall be served shall state in his return or answer:

First.—Whether he have or have not the party in his custody or under his power or restraint.

Second.—If he have the party in his custody or power, or under his restraint, he shall state the authority and cause of imprisonment or restraint, setting forth the same at large.

Third.—If the party be restrained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return or answer, and the original shall be produced on the hearing.

Fourth.—If the officer or person upon whom the writ is served shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but such person has escaped, or such officer or person has transferred the custody or restraint to another, the return or answer shall state the facts particularly, and, in case of transfer, set forth the time and place, for what cause, and by what authority the transfer took place.

Fifth.—The return must be signed by the officer or person making it, and, except when a sworn public officer shall make return in his official capacity, it shall be verified by his oath.

HISTORY: Codes 1892, § 2240; 1906, § 2459; Hemingway's 1917, § 2025; 1930, § 1928; 1942, § 2829.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

Sufficiency of answer where party is in custody of captain of military company.

Birdsong v. Blackman, 127 Miss. 693, 90 So. 441, 1921 Miss. LEXIS 272 (Miss. 1921).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 91, 141 et seq.

Return and other pleadings, 13 Am. Jur. Pl & Pr Forms (Rev ed), Habeas Corpus, Forms 231-262.

CJS.

39 C.J.S., Habeas Corpus §§ 370, 371.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-31. Penalty for disobedience of the writ.

Any person who is duly served with a writ of habeas corpus commanding him to produce the body of any other person in his custody, who shall fail to produce the body of the person before the judge, according to the command of the writ, shall forfeit and pay to the party not so produced the sum of One Thousand Dollars (\$1,000.00), to be recovered before any court having jurisdiction, the right to recover which shall not cease by the death of either party. The judge before whom the writ was made returnable may also punish the person failing to obey the command thereof or to perform the duties prescribed, or to obey such order as the judge may make, as for a contempt, and compel obedience by process of attachment or otherwise. Any officer from whom the custody of any person is taken by writ of habeas corpus who shall fail to return the cause of commitment of any prisoner or other person as prescribed, may be punished in like manner.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (3); 1857, ch. 48, art. 8; 1871, § 1407; 1880, § 2529; 1892, § 2241; 1906, § 2460; Hemingway's 1917, § 2026; 1930, § 1929; 1942, § 2830.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

CJS.

39 C.J.S., Habeas Corpus § 321.

Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

Law Reviews.

Habeas corpus: The "Great Writ" in

§ 11-43-33. The trial.

The judge or chancellor before whom the prisoner or other person may be brought, shall inquire into the cause of imprisonment or detention, and shall either discharge, commit, admit to bail, or remand the prisoner, or award the custody to the party entitled thereto, as the law and the evidence shall require; and may also award costs and charges, for or against either party, as may seem

right. And the clerk of the court in whose office the proceedings may be filed, shall issue execution for the costs and charges so awarded, against the party bound therefor. But the judge may continue the trial from day to day as the case may require.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (4); 1857, ch. 48, art. 10; 1871, § 1049; 1880, § 2530; 1892, § 2242; 1906, § 2461; Hemingway's 1917, § 2027; 1930, § 1930; 1942, § 2831.

Cross References — Continuance of action or proceeding where counsel is legislator, see § 11-1-9.

County prosecuting attorney's duty to appear at habeas corpus trials, see § 19-23-11.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Custody of minors.
3. Discharge of accused.
4. Admission to bail.

1. In general.

Circuit court was not required to hold an evidentiary hearing before denying appellant's petition for a writ of habeas corpus because no writ of habeas corpus was granted; neither the statutes nor the Uniform Rules of Circuit and County Court Practice mandate a hearing upon every petition for a writ of habeas corpus, but instead, both contemplate scenarios where the petition would be summarily dismissed on its face. *Johnson v. State*, 159 So. 3d 601, 2014 Miss. App. LEXIS 667 (Miss. Ct. App. 2014).

The remedies contained in this section [Code 1972, § 11-43-33] do not include a bar to any further prosecution for the charged offense, and the habeas corpus court could not release the prisoner from his bond to appear in the circuit court and could not enjoin the district attorney from prosecuting the petitioner for the charged offense. *Keller v. Romero*, 303 So. 2d 481, 1974 Miss. LEXIS 1444 (Miss. 1974).

That sheriff in habeas corpus trial took initiative and introduced evidence first

did not affect materiality of evidence so as to preclude conviction for perjury. *Slade v. State*, 119 So. 355 (Miss. 1928).

2. Custody of minors.

In habeas corpus suit brought by mother to obtain custody of two children from father, custody having previously been granted mother by decree of chancery court, chancery decree was sufficient basis for awarding custody in habeas corpus suit to mother. *Hinman v. Craft*, 204 Miss. 568, 37 So. 2d 770, 1948 Miss. LEXIS 390 (Miss. 1948).

Only final judgment that can be rendered for custody of child is its liberty or award to person entitled thereto. *Yarbrough v. Dunnam*, 130 Miss. 669, 94 So. 892, 1922 Miss. LEXIS 250 (Miss. 1922).

After judgment awarding custody of infant to parents, court cannot require them to permit child to visit grandparents. *Gray v. Gray*, 121 Miss. 541, 83 So. 726, 1920 Miss. LEXIS 101 (Miss. 1920).

3. Discharge of accused.

Accused, convicted on an affidavit charging no crime, should have been discharged on writ of habeas corpus. *Ex parte Weems*, 96 Miss. 635, 51 So. 2, 1910 Miss. LEXIS 157 (Miss. 1910).

4. Admission to bail.

It is not essential on an application for

bail by a person who is indicted for murder that all the witnesses whose names are indorsed on the indictment shall be examined. If the judge be led to believe that there is other testimony procurable and important, he should postpone the hearing. *Ex parte Floyd*, 60 Miss. 913, 1883 Miss. LEXIS 35 (Miss. 1883).

A person discharged on bail will not be considered as restrained of his liberty so as to be entitled to a writ of habeas corpus, and if released on bail on habeas corpus, the supreme court on appeal from that decision cannot discharge him from the bond on grounds that he should have been

discharged without bond. *Ex parte Walker*, 53 Miss. 366, 1876 Miss. LEXIS 81 (Miss. 1876).

The bill of rights makes bail a matter of right for all crimes except capital felony where the "presumption is great or proof evident." The courts of many of the states hold the indictment for murder as furnishing "the presumption great" and decline to hear testimony to reduce the grade of the crime from murder to manslaughter. *Street v. State*, 30 Miss. 681 (1856); the practice has been to receive testimony aliunde, *Street v. State*, 43 Miss. 1, 1870 Miss. LEXIS 1 (Miss. 1870).

RESEARCH REFERENCES

ALR.

Determination of sufficiency of charge of crime. 40 A.L.R.2d 1151.

Admission of petitioner to bail pending determination of habeas corpus on merits. 56 A.L.R.2d 668.

Court's power in habeas corpus proceedings relating to custody of child to adjudicate questions as to child's support. 17 A.L.R.3d 764.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies § 40 et seq.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

CJS.

39 C.J.S., Habeas Corpus § 327-332, 415, 416, 421-427, 456, 472-475.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-35. Temporary orders.

The court or judge may make any temporary order in the cause during the progress of the proceedings that may be right and proper, or that justice may require.

HISTORY: Codes, 1892, § 2243; 1906, § 2462; Hemingway's 1917, § 2028; 1930, § 1931; 1942, § 2832.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. Interstate compact on the placement of children.

As the Department of Human Services

was the "sending agency" under the Interstate Compact on the Placement of Children, it had all the powers necessary to

effectuate the purpose of the statute, including the power to intervene in a North Carolina lawsuit to bring back to Mississippi, for the purpose of determining custody, a child who had been sent to North Carolina to live with relatives and, therefore, the chancellor could order the de-

partment to intervene in the North Carolina lawsuit and return the child to the state of Mississippi so that a full trial on the issue of custody could be had. Oktibbeha County Dep't of Human Servs. v. N. G., 782 So. 2d 1226, 2001 Miss. LEXIS 33 (Miss. 2001).

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in

Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-37. Return not conclusive.

The return or answer made to a writ of habeas corpus shall not be conclusive as to the facts therein stated, but evidence may be received to contradict the same.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (5); 1857, ch. 48, art. 11; 1871, § 1410; 1880, § 2531; 1892, § 2244; 1906, § 2463; Hemingway's 1917, § 2029; 1930, § 1932; 1942, § 2833.

Cross References — Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

Under the Constitution of Mississippi, bail for capital crime is a matter of right if well founded doubt of the prisoner's guilt be sustained. *Ex parte Bridewell*, 57 Miss. 39, 1879 Miss. LEXIS 10 (Miss. 1879).

Evidence is not admissible of the guilt or innocence of the relator where he has already been convicted. *Donnell v. State*, 48 Miss. 661, 1873 Miss. LEXIS 89 (Miss. 1873).

RESEARCH REFERENCES

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 106 et seq.

Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

Law Reviews.

Habeas corpus: The "Great Writ" in

§ 11-43-39. Witnesses subpoenaed—affidavits of.

The judge or chancellor may issue or order subpoenas for witnesses and compel their attendance, as a circuit court could in term time, and fine witnesses or others for contempt. Whenever the personal attendance of a

witness cannot be procured, his affidavit, taken on reasonable notice to the adverse party, may be received in evidence.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (6); 1857, ch. 48, art. 12; 1871, § 1411; 1880, § 2532; 1892, § 2245; 1906, § 2464; Hemingway's 1917, § 2030; 1930, § 1933; 1942, § 2834.

Cross References — Subpoena of witnesses generally, see §§ 13-3-93 et seq., 99-9-11 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

In a habeas corpus proceeding by a mother against paternal aunt and paternal grandparents seeking custody of two children awarded to the mother by a prior divorce decree, the trial court erred in suppressing affidavits of nonresident wit-

nesses whose personal attendance could not be procured, where the affidavits were taken on notice to the adverse party, and counsel for both sides had examined them. *Neal v. Neal*, 238 Miss. 572, 119 So. 2d 273, 1960 Miss. LEXIS 440 (Miss. 1960).

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in

Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-41. Record of proceedings.

The proceedings and judgment shall in all cases be entered of record. If the trial be in vacation, the proceedings shall be written out and signed by the judge or chancellor and deposited with the clerk of the circuit court of the county in which the habeas corpus is tried, unless the judge shall direct it to be deposited with such clerk of some other county. If either party require it, the evidence shall be made a part of the record by bill of exceptions, as in other cases.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (7); 1857, ch. 48, art. 13; 1871, § 1412; 1880, § 2533; 1892, § 2246; 1906, § 2465; Hemingway's 1917, § 2031; 1930, § 1934; 1942, § 2835.

Cross References — Record of trial, see §§ 9-13-31 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-43. Conclusiveness of judgment.

The judgment rendered on the trial of any writ of habeas corpus shall be conclusive until reversed, and, whilst so in force, shall be a bar to another habeas corpus in the same cause, or to any other proceedings, to bring the same matter again in question, except by appeal or by action for false imprisonment; nor shall any person so discharged be afterward confined for the same cause, except by a court of competent jurisdiction.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 1 (8); 1857, ch. 48, art. 15; 1871, § 1413; 1880, § 2534; 1892, § 2247; 1906, § 2466; Hemingway's 1917, § 2032; 1930, § 1935; 1942, § 2836.

Cross References — Appeals from cases that are returnable at any time, see § 11-3-3.

Appeal in habeas corpus cases, see § 11-43-53.

Appeal from judgment on habeas corpus, see § 11-43-55.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

Under this section [Code 1942, § 2836], the remedy of one to whom habeas corpus has been denied is by appeal and not a subsequent petition. *Bellew v. Dedeaux*, 240 Miss. 79, 126 So. 2d 249, 1961 Miss. LEXIS 433 (Miss. 1961).

Judgment awarding custody of child to person entitled thereto is *res judicata* of rights of parties as facts then existed. *Yarbrough v. Dunnam*, 130 Miss. 669, 94 So. 892, 1922 Miss. LEXIS 250 (Miss. 1922).

But new evidence of old facts will not do; a new state of case which in and of itself presents a ground for granting bail alone can prevent the bar. *Ex parte Nichols*, 62 Miss. 158, 1884 Miss. LEXIS 38 (Miss. 1884); *Ex parte Hamilton*, 65 Miss. 98, 3 So. 68, 1887 Miss. LEXIS 25 (Miss. 1887).

A legislative act making prisoner a competent witness does not give him a right to a new writ when the first was denied before the passage of the act. *Ex parte Nichols*, 62 Miss. 158, 1884 Miss. LEXIS 38 (Miss. 1884).

The statute does not preclude the issuance of a second writ based upon facts which have occurred since the first hearing. *Ex parte Pattison*, 56 Miss. 161, 1878 Miss. LEXIS 52 (Miss. 1878); *Ex parte Bridewell*, 57 Miss. 177, 1879 Miss. LEXIS 41 (Miss. 1879).

A mistrial is not such a fact as will entitle to bail, nor is bad health unless it be shown by the evidence that the confinement will probably produce fatal or serious results. *Ex parte Pattison*, 56 Miss. 161, 1878 Miss. LEXIS 52 (Miss. 1878).

RESEARCH REFERENCES

ALR.

Abuse of writ as basis for dismissal of state prisoner's second or successive petition for federal habeas corpus. 60 A.L.R. Fed. 481.

Judgment, 13 Am. Jur. Pl & Pr Forms (Rev), Habeas Corpus, Forms 271-302.

39 Am. Jur. Trials, Historical Aspects and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 149 et seq.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-45. Sheriff to attend trial.

The sheriff, when required by the judge or chancellor, shall attend in person, or by deputy, upon the trial of a habeas corpus in his county, to keep order and execute the mandates of the judge or chancellor, and shall be subject to the orders of the judge or chancellor during the trial in vacation in the same manner as in term time. The judge or chancellor trying a habeas corpus in vacation shall have the same power to fine and imprison for contempt as in term time.

HISTORY: Codes, 1871, § 1414; 1880, § 2535; 1892, § 2248; 1906, § 2467; Hemingway's 1917, § 2033; 1930, § 1936; 1942, § 2837.

Cross References — Sheriff attending courts and executing orders, see § 19-25-35. Fee allowed sheriff for attendance of prisoner on habeas corpus trial, see § 25-7-21. Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, § 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in

Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-47. Costs in certain cases, and security for.

When the application for a writ of habeas corpus is in the nature of a civil action between parties, the law providing for security for costs shall be applicable; and in such cases persons who may produce the body of another, or render other services, may be allowed the same fees as allowed by law to officers for the same services, the costs to be taxed and collected as in other cases.

HISTORY: Codes, 1880, § 2538; 1892, § 2249; 1906, § 2468; Hemingway's 1917, § 2034; 1930, § 1937; 1942, § 2838.

Cross References — Deposit for costs being certified on transcript, see § 11-51-69.

Costs in criminal prosecutions, see §§ 99-1-11 et seq.

Deposit for costs in criminal appeals cases, see § 99-35-107.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Costs in civil actions or suits, see Chapter 53 of this title.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Am. Jur.

24A Am. Jur. Pl & Pr Forms (Rev),
Venue, Form 291.2 (Motion – For change
of venue – To county where real property
subject to litigation is located).

Law Reviews.

Habeas corpus: The “Great Writ” in
Mississippi state courts. 58 Miss. L. J. 25,
Spring, 1988.

§ 11-43-49. Defaulting witness dealt with.

If a witness shall not obey the subpoena served on him in case of habeas corpus, the judge or chancellor may not only issue, or cause the clerk to issue, an attachment for the witness, but shall indorse on the subpoena the default of the witness and a fine therefor, and file it with the other papers in the clerk’s office of the proper circuit court. Scire facias shall issue for the witness, returnable before the court, and proceedings shall be had as provided in case of a defaulting witness in the circuit court.

HISTORY: Codes, 1880, § 2539; 1892, § 2250; 1906, § 2469; Hemingway’s 1917, § 2035; 1930, § 1938; 1942, § 2839.

Cross References — Attachment of non-appearing subpoenaed witness, see §§ 13-3-103, 99-9-19.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The “Great Writ” in Mississippi state courts. 58 Miss. L. J. 25,
Spring, 1988.

§ 11-43-51. Liabilities and rights of witnesses.

Witnesses in a habeas corpus case shall be subject to the same penalties, and be entitled to the same privileges and compensation, and be paid in the same way, as in other cases. They may prove their attendance before the clerk in whose office the record of the proceeding is filed, and obtain from him a certificate of their attendance and of the compensation to which they are

entitled, as in cases in the circuit courts; or the judge trying the case may give the witnesses certificates of their attendance and the compensation to which they are entitled, which shall have the same effect as such certificates in a like case by the clerk.

HISTORY: Codes, 1880, § 2541; 1892, § 2251; 1906, § 2470; Hemingway's 1917, § 2036; 1930, § 1939; 1942, § 2840.

Cross References — Witness fees, see §§ 25-7-47 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

RESEARCH REFERENCES

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-53. Appeal in habeas corpus.

Any party aggrieved by the judgment on the trial of a habeas corpus, shall have an appeal to the Supreme Court. If any person held in service by this state, or by the United States, should be discharged by any judge in vacation, or any court, on habeas corpus, the Attorney General or any district attorney, or any attorney duly authorized by the United States, may in like manner obtain an appeal to reverse the judgment by which such person was discharged.

HISTORY: Codes, Hutchinson's 1848, ch. 65, art. 9; 1857, ch. 48, art. 16, 17; 1871, §§ 1415, 1416; 1880, §§ 2312, 2313; 1892, § 35; 1906, § 36; Hemingway's 1917, § 11; 1930, § 15; 1942, § 1149.

Cross References — Time for returning appeal in habeas corpus, see § 11-3-3.

Appeals in criminal cases, see §§ 99-35-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief, Act, see §§ 99-39-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

The Supreme Court was authorized to treat a criminal defendant's appeal from a circuit court's denial of his motion to dismiss the indictment against him on double jeopardy grounds as an appeal

from a denial of a writ of habeas corpus under § 11-43-53, or, alternatively, as an application to the Supreme Court for a writ of habeas corpus under §§ 11-43-7 and 11-43-9, since the defendant's double jeopardy claim went beyond his right not

to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore the Supreme Court had jurisdiction of the defendant's appeal under Art I § 9 of the United States Constitution and Art 3 § 21 of the Mississippi Constitution, which guarantee the right of habeas corpus. *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

All appeals from a trial of a habeas corpus, whether tried in circuit, chancery, or county court, must be to the Supreme Court. *Wilson v. State*, 318 So. 2d 889, 1975 Miss. LEXIS 1463 (Miss. 1975).

A county judge, passing upon an application in habeas corpus, acts not as a county court, but with all the power and authority of a circuit judge or chancellor,

and an appeal may be taken direct to the supreme court under this section [Code 1942, § 1149]. *Cole v. Cole*, 194 Miss. 292, 12 So. 2d 425, 1943 Miss. LEXIS 71 (Miss. 1943).

In a proceeding for a writ of habeas corpus to compel the admission of the relator to bail, the sheriff who has the custody of the relator is a "party aggrieved" and entitled to appeal. *Edmonson v. Ramsey*, 122 Miss. 450, 84 So. 455, 1920 Miss. LEXIS 446 (Miss. 1920).

The state, though not formally designated as such, is always a real party to the record in habeas corpus proceedings where the petitioner is being held to await trial for an alleged violation of the criminal law, and is therefore entitled to appeal from a judgment adverse to its interest. *State v. Gordon*, 105 Miss. 454, 62 So. 431, 1913 Miss. LEXIS 231 (Miss. 1913).

RESEARCH REFERENCES

ALR.

Habeas corpus on ground of deprivation of right to appeal. 19 A.L.R.2d 789.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 91, 141 et seq.

39 Am. Jur. Trials, Historical Aspects

and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

CJS.

39 C.J.S., Habeas Corpus §§ 472-509.

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

§ 11-43-55. Procedure on appeal from judgment on habeas corpus.

An appeal from a judgment on the trial of a writ of habeas corpus may be had by or in behalf of the person deprived of his liberty on the same terms and conditions as are provided for in criminal cases; but such appeal shall not entitle a party to be discharged on bail in any case held not to be one in which the party is entitled to bail. In all other cases, an appeal from a judgment on trial of a writ of habeas corpus may be had on their terms prescribed for appeals in civil cases, where a supersedeas is not desired.

HISTORY: Codes, 1880, §§ 2337, 2338; 1892, § 63; 1906, § 64; Hemingway's 1917, § 40; 1930, § 43; 1942, § 1177.

Cross References — Return-day for appeal in habeas corpus, see § 11-3-3.

Requirement for bail in habeas corpus, see § 11-43-13.

Conclusiveness of judgment in habeas corpus, see § 11-43-43.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1

et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

Proceedings pertaining to the writ of habeas corpus, see Miss. R. Civ. P. 81.

Application for post-conviction collateral relief in criminal cases, see Miss. R. App. P. 22.

JUDICIAL DECISIONS

1. In general.

All appeals from a trial of a habeas corpus, whether tried in circuit, chancery,

or county court, must be to the Supreme Court. *Wilson v. State*, 318 So. 2d 889, 1975 Miss. LEXIS 1463 (Miss. 1975).

RESEARCH REFERENCES

ALR.

Habeas corpus on ground of deprivation of right to appeal. 19 A.L.R.2d 789.

and Procedural Limitations of Federal Habeas Corpus, §§ 1 et seq.

CJS.

39 C.J.S., Habeas Corpus §§ 472-509.

Am. Jur.

39 Am. Jur. 2d, Habeas Corpus and Postconviction Remedies §§ 91, 141 et seq.

39 Am. Jur. Trials, Historical Aspects

Law Reviews.

Habeas corpus: The "Great Writ" in Mississippi state courts. 58 Miss. L. J. 25, Spring, 1988.

CHAPTER 44.

COMPENSATION TO VICTIMS OF WRONGFUL CONVICTION AND IMPRISONMENT

Sec.

- 11-44-1. Legislative findings and intent.
- 11-44-3. Prerequisite for claim for compensation.
- 11-44-5. Jurisdiction of claims for wrongful conviction and imprisonment.
- 11-44-7. Determination of eligibility for compensation; award of compensation.
- 11-44-9. Statute of limitations on commencement of action for compensation.
- 11-44-11. Appeal of claim of wrongful conviction and imprisonment decision.
- 11-44-13. Effect of death of claimant prior to filing claim or full payment of compensation.
- 11-44-15. Release from future claims against the state.

§ 11-44-1. Legislative findings and intent.

The Legislature finds that innocent persons who have been wrongly convicted of felony crimes and subsequently imprisoned have been uniquely victimized, have distinct problems reentering society, and should be compensated. In light of the particular and substantial horror of being imprisoned for a crime one did not commit, the Legislature intends by enactment of the provisions of this chapter that innocent people who are wrongfully convicted be able to receive monetary compensation.

HISTORY: Laws, 2009, ch. 472, § 1, eff from and after July 1, 2009.

Comparable Laws from other States — Code of Alabama, § 29-2-150 et seq.
 California Penal Code, § 4900 et seq.
 Connecticut Annotated Statutes, § 54-102pp, 54-102uu.
 Florida Annotated Statutes, § 961.01 et seq.
 Texas Civil Practice and Remedies Code, § 103.001 et seq.
 Virginia Code Annotated, § 8.01-195.10 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Evidence — sufficiency.

1. In general.

In a case in which plaintiff sought compensation for the time that he served in prison because of his criminal convictions for issuing and delivering bad checks, the appellate court found that despite being given ample opportunity to prove his innocence, plaintiff failed to do so. Even though the convictions were reversed, plaintiff was unable to rebut the properly applied statutory presumption of guilt.

Higgins v. State, 202 So. 3d 1274, 2016 Miss. App. LEXIS 365 (Miss. Ct. App. 2016).

2. Evidence — sufficiency.

In a case in which appellant requested compensation under the Mississippi Wrongful Conviction Act, the trial court's finding that defendant had failed to show by a preponderance of the evidence that he was wrongfully convicted for failure to register as a sex offender was supported by substantial evidence. Williams v. State, 220 So. 3d 243, 2017 Miss. App. LEXIS 280 (Miss. Ct. App. 2017).

§ 11-44-3. Prerequisite for claim for compensation.

(1) In order to present an actionable claim for wrongful conviction and imprisonment under this chapter, a claimant must establish by documentary evidence that:

(a) The claimant has been convicted of one or more felonies and subsequently sentenced to a term of imprisonment and has served all or any part of the sentence;

(b) On grounds not inconsistent with innocence:

(i) The claimant was pardoned for the felony or felonies for which sentenced and which are the grounds for the complaint and the pardon is based on the innocence of the claimant which must be affirmatively stated in the pardon; or

(ii) The judgment of conviction was vacated and/or reversed;

(c) If there was a vacatur or reversal, either the accusatory instrument was dismissed or nol prossed; or if a new trial was held, the defendant was found not guilty;

(d) The claimant's claim is not time-barred by the provisions of this chapter; and

(e) The claimant did not intentionally waive any appellate or post-conviction remedy otherwise available in order to benefit under this chapter.

(2) The claim shall be verified by the claimant.

(3) If the court finds after reading the claim that the claimant has not demonstrated the foregoing, it shall dismiss the claim, either on its own motion or on the state's motion. This dismissal shall be without prejudice to allow adequate refile within ninety (90) days.

HISTORY: Laws, 2009, ch. 472, § 2, eff from and after July 1, 2009.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in (1) by substituting "...claim for wrongful conviction and imprisonment under this chapter..." for "...claim for wrongful conviction and imprisonment under this section..." The Joint Committee ratified the correction at its August 16, 2012, meeting.

JUDICIAL DECISIONS

ANALYSIS

1. Applicability.
2. Relief granted.
3. Relief not granted.
4. Requirements met.

1. Applicability.

Claimant was entitled to compensation for the time which the claimant served under house arrest in Mississippi's Intensive Supervision Program because the claimant was later was determined to

have been wrongfully convicted. *Tipton v. State*, 150 So. 3d 82, 2014 Miss. LEXIS 542 (Miss. 2014).

2. Relief granted.

Requirement that a conviction be vacated on grounds consistent with innocence is most naturally and plainly read to refer to innocence of the felony or felonies referenced in the immediately preceding paragraph, not to some broader notion of "innocence" of any and all related criminal activity, including misdemeanors. There-

fore, appellant was entitled to relief because his conviction was vacated on the ground that he was innocent of the sole felony of which he was convicted, and the possession of certain pills constituted a misdemeanor. *Moore v. State*, 203 So. 3d 775, 2016 Miss. App. LEXIS 209 (Miss. Ct. App.), cert. denied, 204 So. 3d 290, 2016 Miss. LEXIS 480 (Miss. 2016).

3. Relief not granted.

In a case in which plaintiff sought compensation for the time that he served in prison because of his criminal convictions for issuing and delivering bad checks, the appellate court found that despite being given ample opportunity to prove his innocence, plaintiff failed to do so. Even though the convictions were reversed, plaintiff was unable to rebut the properly

applied statutory presumption of guilt. *Higgins v. State*, 202 So. 3d 1274, 2016 Miss. App. LEXIS 365 (Miss. Ct. App. 2016).

4. Requirements met.

Trial court erred in finding that defendant failed to establish his innocence on the basis that the order passing to inactive files was neither a dismissal nor a nol pross because the offense for which he was convicted and sentenced, accessory after the fact, was not a lesser-included offense of burglary of building; thus, there was no indictment for the accessory after the fact offense for which defendant was convicted and sentenced to dismiss, nol pross, or pass to the files. *Hall v. State*, 187 So. 3d 133, 2016 Miss. LEXIS 123 (Miss. 2016).

§ 11-44-5. Jurisdiction of claims for wrongful conviction and imprisonment.

Jurisdiction of all claims of wrongful conviction and imprisonment brought under this chapter shall lie in the circuit court of the county in which the claimant was convicted. The respondent will be the State of Mississippi, which will be represented by the Attorney General's office.

HISTORY: Laws, 2009, ch. 472, § 3, eff from and after July 1, 2009.

§ 11-44-7. Determination of eligibility for compensation; award of compensation.

(1) In order to obtain a judgment under this chapter, a claimant must prove by a preponderance of the evidence that:

(a) He was convicted of one or more felonies and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(i) He has been pardoned for the felony or felonies for which he was sentenced and which are the grounds for the complaint and the pardon is based on the innocence of the claimant which must be affirmatively stated in the pardon; or

(ii) His judgment of conviction was reversed or vacated; and

1. The accusatory instrument was dismissed or nol prossed; or

2. If a new trial was ordered, he was found not guilty at the new trial; and

(b) He did not commit the felony or felonies for which he was sentenced and which are the grounds for the complaint, or the acts or omissions for which he was sentenced did not constitute a felony; and

(c) He did not commit or suborn perjury, or fabricate evidence to bring about his conviction.

(2) If the court finds that the claimant was wrongfully convicted and incarcerated pursuant to subsection (1) of this section, the court shall award:

(a) Fifty Thousand Dollars (\$50,000.00) for each year of incarceration regardless of the number of felonies for which a claimant was convicted, but the total amount for each claimant shall not exceed Five Hundred Thousand Dollars (\$500,000.00). There shall be no compensation for any preindictment detention. This award shall be paid to the claimant in installments of Fifty Thousand Dollars (\$50,000.00) per year until the award is fully paid. The state may purchase an annuity to satisfy this obligation.

(b) Reasonable attorney's fees for bringing a claim under this chapter calculated at ten percent (10%) of the amount awarded under paragraph (a) of this subsection for preparing and filing the claim, twenty percent (20%) for litigating the claim if it is contested by the Attorney General, and twenty-five percent (25%) if the claim is appealed, plus expenses. These fees shall not be deducted from the compensation due the claimant, nor is counsel entitled to receive additional fees from the client for a claim under this section.

(3) The award shall not be subject to:

(a) Any cap applicable to private parties in civil lawsuits;

(b) Any taxes, except that those portions of the judgment awarded as attorney's fees for bringing a claim under this chapter shall be taxable as income to the attorney; or

(c) Treatment as gross income to a claimant under the provisions of Title 27, Chapter 7, Mississippi Code of 1972.

(4) A claimant may choose to pursue a claim under this chapter in lieu of pursuing a claim against the State of Mississippi or a political subdivision thereof under the Mississippi Tort Claims Act, Section 11-46-1 et seq., Mississippi Code of 1972. Any claimant who obtains an award under this chapter may not obtain an award by reason of the same subject against the State of Mississippi or a political subdivision thereof under the provisions of the Mississippi Tort Claims Act, Section 11-46-1 et seq., Mississippi Code of 1972.

(5) The immunity of the State of Mississippi and any political subdivision thereof is hereby waived with respect to the claims described in this chapter and within the limits prescribed by this chapter.

HISTORY: Laws, 2009, ch. 472, § 4, eff from and after July 1, 2009.

JUDICIAL DECISIONS

ANALYSIS

1. Applicability.
2. Conviction held proper.
3. Evidence; admissibility.
4. Evidence; sufficiency.
5. No right to jury trial.

6. Relief granted.
7. Requirements met.
8. Attorney's fees

1. Applicability.

Trial court erred in granting summary judgment to the State in a former inmate's

action for compensation for the years he spent in custody because the Wrongful Conviction and Imprisonment Act required an element of intent to fabricate evidence, an issue of material fact remained as to the former inmate's intent to bring about his conviction when fabricating evidence where he testified that, being 13-years old at the time, he confessed with the intent to help his sister and not to fabricate evidence or be incarcerated, and although the Act was completely silent as to whether a jury trial could be, and the right to a jury trial was unquestionably the former inmate's right. *Edmonds v. State*, 234 So. 3d 286, 2017 Miss. LEXIS 269 (Miss. 2017).

Claimant was entitled to compensation for the time which the claimant served under house arrest in Mississippi's Intensive Supervision Program because the claimant was later was determined to have been wrongfully convicted. *Tipton v. State*, 150 So. 3d 82, 2014 Miss. LEXIS 542 (Miss. 2014).

2. Conviction held proper.

Defendant failed to prove by a preponderance of the evidence that he was actually innocent of possessing marijuana with intent to distribute, and thus the denial of his claim for compensation under the wrongful-conviction and restitution statute was proper; he admitted that he was voluntarily in the home where marijuana was actually being cut and bagged for distribution, a detective testified that it appeared that defendant had either placed a package of marijuana in a bowl or he was reaching for a package, and the trial court found the detective credible, and thus defendant failed to show that he did not constructively possess the marijuana found in the home. *Martin v. State*, 221 So. 3d 374, 2016 Miss. App. LEXIS 721 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 977, 2017 Miss. LEXIS 260 (Miss. 2017).

Trial court properly ruled in favor of the State in a former prisoner's action seeking compensation for wrongful conviction and imprisonment under the Mississippi Wrongful Conviction Act because substantial evidence supported the findings that the former prisoner intentionally set the

fire that led to his incarceration and that he failed to prove the absence of malice; the former prisoner's narrative varied between the civil and criminal trials, and a witness testified to establish his intent. *Isaac v. State*, 187 So. 3d 1009, 2016 Miss. LEXIS 140 (Miss. 2016).

Trial court properly ruled in favor of the State in a former prisoner's action seeking compensation for wrongful conviction and imprisonment under the Mississippi Wrongful Conviction Act because it did not err in failing to explicitly discuss the malice element of arson; the trial court clearly determined that the former prisoner intentionally set a fire and that he failed to prove that he did not maliciously set the fire. *Isaac v. State*, 187 So. 3d 1009, 2016 Miss. LEXIS 140 (Miss. 2016).

Appellant's suit against the State for wrongful conviction and imprisonment for possession of a firearm by a convicted felon was properly dismissed. His claim that the firearm was inoperable was unavailing because he offered no evidence that it could not be readily converted to expel a projectile, and Miss. Code Ann. § 97-37-5(1) did not require the State to prove that it was operable at the time of his arrest. *Hymes v. State*, 121 So. 3d 938, 2013 Miss. App. LEXIS 272 (Miss. Ct. App. 2013), overruled in part, *Edmonds v. State*, 234 So. 3d 286, 2017 Miss. LEXIS 269 (Miss. 2017).

3. Evidence; admissibility.

Appellant claimed that in his wrongful conviction and imprisonment suit, the trial court erred in admitting his co-defendant's prior testimony under Miss. R. Evid. 804(b)(1), because appellant's counsel in the criminal trial was ineffective in cross-examining that witness. This claim failed because appellant, in his criminal appeal based on ineffective assistance, never objected to his attorney's cross-examination of this witness. *Hymes v. State*, 121 So. 3d 938, 2013 Miss. App. LEXIS 272 (Miss. Ct. App. 2013), overruled in part, *Edmonds v. State*, 234 So. 3d 286, 2017 Miss. LEXIS 269 (Miss. 2017).

4. Evidence; sufficiency.

In a case in which appellant requested compensation under the Mississippi

Wrongful Conviction Act, the trial court's finding that defendant had failed to show by a preponderance of the evidence that he was wrongfully convicted for failure to register as a sex offender was supported by substantial evidence. *Williams v. State*, 220 So. 3d 243, 2017 Miss. App. LEXIS 280 (Miss. Ct. App. 2017).

Appellant's suit against the State alleging wrongful conviction and imprisonment was properly dismissed because he failed to present sufficient evidence to demonstrate that he did not constructively possess any of the marijuana recovered from his co-defendant's vehicle. *Hymes v. State*, 121 So. 3d 938, 2013 Miss. App. LEXIS 272 (Miss. Ct. App. 2013), overruled in part, *Edmonds v. State*, 234 So. 3d 286, 2017 Miss. LEXIS 269 (Miss. 2017).

In a case in which plaintiff sought compensation for the time that he served in prison because of his criminal convictions for issuing and delivering bad checks, it was plaintiff's duty to disprove every element of the crime for which he was charged and convicted. Despite being given ample opportunity to prove his innocence, plaintiff failed to do so. *Higgins v. State*, 202 So. 3d 1274, 2016 Miss. App. LEXIS 365 (Miss. Ct. App. 2016).

5. No right to jury trial.

Appellant was not entitled to a jury trial in his suit against the State alleging wrongful conviction and imprisonment, because the right to a jury trial under Miss. Const. art. III, § 31 applies only to those cases in which a jury trial was necessary at common law, and at common law, sovereign immunity prevented citizens from suing the State. *Hymes v. State*, 121 So. 3d 938, 2013 Miss. App. LEXIS 272 (Miss. Ct. App. 2013), overruled in part, *Edmonds v. State*, 234 So. 3d 286, 2017 Miss. LEXIS 269 (Miss. 2017).

6. Relief granted.

Requirement that a conviction be vacated on grounds consistent with innocence is most naturally and plainly read to refer to innocence of the felony or felonies referenced in the immediately preceding

paragraph, not to some broader notion of "innocence" of any and all related criminal activity, including misdemeanors. Therefore, appellant was entitled to relief because his conviction was vacated on the ground that he was innocent of the sole felony of which he was convicted, and the possession of certain pills constituted a misdemeanor. *Moore v. State*, 203 So. 3d 775, 2016 Miss. App. LEXIS 209 (Miss. Ct. App.), cert. denied, 204 So. 3d 290, 2016 Miss. LEXIS 480 (Miss. 2016).

7. Requirements met.

Use of the word "if" to create conditional clauses, such as, "if the claim is appealed," along with the lack of any other potentially additive language, reflects the Legislature's intent to use "and" to connect alternatives rather than aggregate numbers; in other words, the word "and" creates a sliding scale for calculating the fee award, and as a result, the plain language of the statute does not require the percentages to be added together if the subsequent conditions are met. *Hall v. State*, 241 So. 3d 629, 2018 Miss. LEXIS 50 (Miss. 2018).

Trial court erred in finding that defendant failed to establish his innocence on the basis that the order passing to inactive files was neither a dismissal nor a nol pross because the offense for which he was convicted and sentenced, accessory after the fact, was not a lesser-included offense of burglary of building; thus, there was no indictment for the accessory after the fact offense for which defendant was convicted and sentenced to dismiss, nol pross, or pass to the files. *Hall v. State*, 187 So. 3d 133, 2016 Miss. LEXIS 123 (Miss. 2016).

8. Attorney's fees

Trial court properly calculated an attorney's fees award as 25 percent of the amount awarded to an inmate's attorneys; the statute creates a sliding scale with increased percentages at each stage of the case (i.e., when the claim is filed, litigated, and appealed), and a plain reading of the statute does not aggregate those percentages for calculating the attorney's fee award. *Hall v. State*, 241 So. 3d 629, 2018 Miss. LEXIS 50 (Miss. 2018).

§ 11-44-9. Statute of limitations on commencement of action for compensation.

(1) An action for compensation brought by a wrongfully convicted person under the provisions of this chapter shall be commenced within three (3) years after either the grant of a pardon or the grant of judicial relief and satisfaction of other conditions described in Section 11-44-3(1); provided, however, that any action by the state challenging or appealing the grant of said judicial relief shall toll the three-year period. Persons convicted, incarcerated and released from custody prior to July 1, 2009, shall commence an action under this chapter not later than June 30, 2012.

(2) Notwithstanding any other provision of law, failure to file any applicable Notice of Claim shall not bar filing of a claim under this chapter.

HISTORY: Laws, 2009, ch. 472, § 5, eff from and after July 1, 2009.

§ 11-44-11. Appeal of claim of wrongful conviction and imprisonment decision.

Any party aggrieved by a decision as to a claim brought under this chapter is entitled to appeal the decision as in other civil cases.

HISTORY: Laws, 2009, ch. 472, § 6, eff from and after July 1, 2009.

§ 11-44-13. Effect of death of claimant prior to filing claim or full payment of compensation.

If a claimant dies prior to the full payment of any claim awarded under this chapter, the remaining payments shall be made to his or her estate or heirs. If any potential claimant dies prior to the filing of a claim, the claim may be filed by and on behalf of his or her estate or heirs.

HISTORY: Laws, 2009, ch. 472, § 7, eff from and after July 1, 2009.

§ 11-44-15. Release from future claims against the state.

Any claimant who receives compensation under this chapter shall sign a release from all claims against the state regarding the incarceration for which the claimant receives compensation.

HISTORY: Laws, 2009, ch. 472, § 8, eff from and after July 1, 2009.

CHAPTER 45.

SUITS BY AND AGAINST THE STATE OR ITS
POLITICAL SUBDIVISIONS

Sec.

- 11-45-1. When the state may be sued.
- 11-45-3. Service of summons and conduct of case.
- 11-45-5. Payment of judgment or decree against the state.
- 11-45-7. Remedy against intruders on the lands of the state.
- 11-45-9. Any property accrued to the state recovered.
- 11-45-11. The state entitled to all actions — unlawful detainer for its lands.
- 11-45-13. Certain suits abated.
- 11-45-15. County to have like remedies.
- 11-45-17. County may sue and be sued.
- 11-45-19. Suit where part only of county is interested.
- 11-45-21. Bond not to be required.
- 11-45-23. Property recovered delivered to agent.
- 11-45-25. Suits by and against municipalities.

§ 11-45-1. When the state may be sued.

Any person having a claim against the State of Mississippi, after demand made of the auditor of public accounts therefor, and his refusal to issue a warrant on the treasurer in payment of such claim, may, where it is not otherwise provided, bring suit therefor against the state, in the court having jurisdiction of the subject matter which holds its sessions at the seat of government; and, if there be no such court at the seat of government, such suit may be instituted in such court in the county in which the seat of government may be.

HISTORY: Codes, 1871, § 1573; 1880, § 2641; 1892, § 4248; 1906, § 4800; Hemingway's 1917, § 3164; 1930, § 5997; 1942, § 4387.

Editor's Notes — Section 7-7-2, as added by Laws, 1984, chapter 488, § 90, and amended by Laws, 1985, chapter 455, § 14, Laws, 1986, chapter 499, § 1, provided, at subsection (2) therein, that the words "state auditor of public accounts," "state auditor," and "auditor" appearing in the laws of the state in connection with the performance of auditor's functions transferred to the state fiscal management board, shall be the state fiscal management board, and, more particularly, such words or terms shall mean the state fiscal management board whenever they appear. Thereafter, Laws, 1989, chapter 532, § 2, amended § 7-7-2 to provide that the words "State Auditor of Public Accounts," "State Auditor" and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer, and, more particularly, such words or terms shall mean the State Fiscal Officer whenever they appear. Subsequently, Laws, 1989, ch. 544, § 17, effective July 1, 1989, and codified as § 27-104-6, provides that wherever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration."

Cross References — Filing of claims against state as result of purchases, services, salaries, travel expense, or other encumbrances made, or liabilities incurred, see § 7-7-27.

Duty of auditor of public accounts to pre-audit all claims, see § 7-7-33.

The issuance, signing, and delivery of warrants for payment of claims by auditor of

public accounts, see § 7-7-35.

Issuance by auditor of public accounts of duplicate warrants in replacement of lost or destroyed warrants, see § 7-7-57.

Immunity of state and its political subdivisions from liability and suit for torts and torts of employees, see §§ 11-46-1 et seq.

Limitation of suits by and against state, counties and municipalities, see § 15-1-51.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Necessity that claim be one that auditor is empowered to audit.

1. In general.

Where plaintiff sued the Mississippi Attorney General to obtain discovery from him for use in an administrative proceeding, as the suit was against him in his official capacity, and under Miss. Const. Art. 4, § 101, the seat of state government was in Hinds County, venue was proper there, not in Rankin County, where he lived. *Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC*, 864 So. 2d 939, 2004 Miss. LEXIS 12 (Miss. 2004).

The proprietary nature of a State agency's conduct is of no consequence in determining whether sovereign immunity is waived for torts committed while engaged in such conduct, since the proprietary-governmental function distinction applies only to cases involving municipalities. *Strait v. Pat Harrison Waterway Dist.*, 523 So. 2d 36, 1988 Miss. LEXIS 114 (Miss. 1988), overruled, *Churchill v. Pearl River Basin Dev. Dist.*, 619 So. 2d 900, 1993 Miss. LEXIS 74 (Miss. 1993).

State auditor held to have discretion and judgment in connection with payment of fees due county officers on land sold for taxes, so that county officer was not entitled to mandamus to compel auditor to issue warrant without first bringing suit. *Thomas v. Price*, 171 Miss. 450, 158 So. 206, 1934 Miss. LEXIS 284 (Miss. 1934).

A suit against the land commissioner to recover the purchase price of a tax title declared void is an action against the state and controlled by this section [Code 1942, § 4387]. *Brown v. Ford*, 112 Miss. 678, 73 So. 722, 1916 Miss. LEXIS 161 (Miss. 1916).

An action against the state to recover the purchase price of a void tax title

should have been brought in Hinds County instead of Wilkinson County. *Brown v. Ford*, 112 Miss. 678, 73 So. 722, 1916 Miss. LEXIS 161 (Miss. 1916).

Where the bill fails to state cause of action the case should be dismissed. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281, 1916 Miss. LEXIS 128 (Miss. 1916).

The auditor and treasurer were made, by Acts 1876 ch 108, the successors of levee board No. 1, and were liable to be sued as such. The state is a proper party to a suit which sought to enforce a right against said board. *State v. Woodruff*, 83 Miss. 111, 36 So. 79, 1903 Miss. LEXIS 17 (Miss. 1903).

A sovereign state cannot be sued except by its consent. *Hall v. State*, 79 Miss. 38, 29 So. 994, 1901 Miss. LEXIS 22 (Miss. 1901).

2. Necessity that claim be one that auditor is empowered to audit.

Pursuant to the general venue statute, venue was proper in the First Judicial District of Harrison County because the Mississippi State Port Authority "resided" there; there was no basis for applying the venue aspect of the statute when the Mississippi Supreme Court had squarely held that the statute did not apply to cases in which the State auditor did not have authority over the claim at issue, like a contractor's breach of contract claim against the Mississippi State Port Authority. *Miss. State Port Auth. at Gulfport v. S. Indus. Contrs. LLC*, 271 So. 3d 742, 2018 Miss. App. LEXIS 653 (Miss. Ct. App. 2018).

Claim by subcontractor against state building commission arising from nonpayment by general contractor is breach of contract claim for damages which auditor is not empowered to audit; accordingly, § 11-45-1 does not apply to claim. *Mississippi State Bldg. Com. v. S & S Moving*,

Inc., 475 So. 2d 159, 1985 Miss. LEXIS 2218 (Miss. 1985).

Claim for privilege taxes erroneously collected, not being subject to allowance by auditor of public accounts, will not support action against state. *National Life & Acci. Ins. Co. v. State*, 159 Miss. 513, 132 So. 549, 1931 Miss. LEXIS 72 (Miss. 1931).

An action cannot be brought upon a claim which the auditor has no authority to audit and allow. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281, 1916 Miss. LEXIS 128 (Miss. 1916).

The chancery court has no power to decree what the state should pay for alleged breach of contract with reference to claims against the state which the auditor may not allow. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281, 1916 Miss. LEXIS 128 (Miss. 1916).

A claim for damages for breach of contract by the state cannot be allowed by the

auditor. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281, 1916 Miss. LEXIS 128 (Miss. 1916).

This section [Code 1942, § 4387] does not embrace claims which the auditor of public accounts is not empowered to audit and allow. *Hall v. State*, 79 Miss. 38, 29 So. 994, 1901 Miss. LEXIS 22 (Miss. 1901).

Under this section [Code 1942, § 4387], suits can be maintained against the state only upon claims which the auditor is empowered to audit. *State v. Dinkins*, 77 Miss. 874, 27 So. 832, 1900 Miss. LEXIS 32 (Miss. 1900).

The governor has sole discretion in respect to offering and paying rewards for the arrest of escaped criminals, and consequently no suit can be maintained against the state to recover a reward which the governor declines to pay. *State v. Dinkins*, 77 Miss. 874, 27 So. 832, 1900 Miss. LEXIS 32 (Miss. 1900).

RESEARCH REFERENCES

ALR.

Tortious breach of contract as within consent to suit against United States or state on contract. 1 A.L.R.2d 864.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state. 81 A.L.R.3d 1239.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

When may claims against United States under Federal Tort Claims Act (28 USCS §§ 2671-2680) be maintained as class action. 48 A.L.R. Fed. 860.

Exceptions to jurisdictional immunity of foreign states and their property under the Foreign Sovereign Immunities Act of 1976 (28 USCS §§ 1602 et seq.). 59 A.L.R. Fed. 99.

Am. Jur.

72 Am. Jur. 2d, States, Territories, and Dependencies §§ 101 et seq.

CJS.

81A C.J.S., States §§ 274, 279, 297 et seq.

§ 11-45-3. Service of summons and conduct of case.

The summons in such suit shall be served on the Attorney General in the mode prescribed by law for the service of a summons in other cases; and he shall appear for the state. The suit shall be proceeded with as if it were between private persons; but a bill shall not be taken as confessed nor a judgment by default be rendered against the state. The answer of the state to any bill need not be under oath or under the great seal, but may be made by the Attorney General for the state.

HISTORY: Codes, 1871, §§ 1577, 1578; 1880, § 2642; 1892, § 4249; 1906, § 4801; Hemingway's 1917, § 3165; 1930, § 5998; 1942, § 4388.

Cross References — Duty of attorney general to direct issuance of process to carry into execution judgment in cause represented by him, see § 7-5-33.

JUDICIAL DECISIONS

1. In general.

In action by plaintiff against state agency, where service was not made on Attorney General as required by Miss Code § 11-45-3 but was instead affected by mailing copy of summons and complaint to manager of local office that committed act complained of, claims against state agency were properly dismissed where plaintiff's counsel failed to estab-

lish good cause why service was not made within prescribed period but merely stated that he had not realized he had served wrong person until motion to dismiss was filed; court noted that deficiency in service had been expressly asserted and explained in agency's answer 4 ½ months prior to motion to dismiss. *Way v. Mueller Brass Co.*, 840 F.2d 303, 1988 U.S. App. LEXIS 3514 (5th Cir. Miss. 1988).

RESEARCH REFERENCES

ALR.

Local government tort liability: Minor-ity as affecting notice of claim requirement. 58 A.L.R.4th 402.

Am. Jur.

22 Am. Jur. Pl & Pr Forms (Rev), States, Territories, and Dependencies, Form 1 (allegation of complaint, petition, or declara-

tion that state official is authorized agent for service of process).

18 Am. Jur. Pl & Pr Forms, States, Territories, and Dependencies, Form 18:1243 (allegation that state attorney general is authorized agent for service of process on state).

CJS.

81A C.J.S., States §§ 574, 575.

§ 11-45-5. Payment of judgment or decree against the state.

A judgment or decree against the state shall not be satisfied except by an appropriation therefor by the legislature, and an execution shall not be issued against the state.

HISTORY: Codes, 1871, § 1580; 1880, § 2644; 1892, § 4250; 1906, § 4802; Hemingway's 1917, § 3166; 1930, § 5999; 1942, § 4389.

JUDICIAL DECISIONS

1. In general.

In a civil rights suit commenced against the State and state officials over conditions at state penitentiary, the trial court did not act outside the scope of its authority in ordering the state auditor to issue a warrant upon the state treasurer and ordering the state treasurer in turn to satisfy the judgment of attorney's fees, where to strike down the order because it was in conflict with Code 1972, § 11-45-5, which

prohibits the satisfaction of any judgment against the state except by an appropriation therefor by the legislature would be allowing the state, by legislative action, to recloak itself with the Eleventh Amendment immunity which Congress had chosen to remove and would be contrary to the command of the Supremacy Clause of the United States Constitution. *Gates v. Collier*, 616 F.2d 1268, 1980 U.S. App. LEXIS 17548 (5th Cir. Miss. 1980).

RESEARCH REFERENCES

Am. Jur.

72 Am. Jur. 2d, States, Territories, and
Dependencies § 99.

CJS.

81A C.J.S., States § 586.

§ 11-45-7. Remedy against intruders on the lands of the state.

If any person shall unlawfully enter on, and intrude upon or hold land belonging to the state, or take possession of or hold any personal property belonging to the state, such person may be proceeded against by action to be instituted by the district attorney of the district, or by the escheator of the county in a proper case. On the trial of the issue, the court or jury shall assess damages for rents and profits, and for injury done to the property by the despoilment of the timber or otherwise. If the trespass complained of be the cutting, belting, girdling, boxing, or otherwise injuring the timber, triple damages shall be recovered.

HISTORY: Codes, 1857, ch. 17, art. 13; 1880, § 893; 1892, § 4251; 1906, § 4803; Hemingway's 1917, § 3167; 1930, § 6000; 1942, § 4390.

Cross References — Persons through which land commissioner may prosecute suits concerning public lands, see § 29-1-7.

Duty of land commissioner to institute and prosecute suits to cancel patents to lands fraudulently obtained or issued, and to recover possession of land, see § 29-1-9.

Disposition by land commissioner of private claims to public lands, see § 29-1-13.

Duty of land commissioner to protect public lands from trespass, see § 29-1-17.

RESEARCH REFERENCES

ALR.

Standard of proof as to conduct underlying punitive damage awards-modern status. 58 A.L.R.4th 878.

CJS.

81A C.J.S., States §§ 529-531 et seq.

Am. Jur.

72 Am. Jur. 2d, States, Territories, and
Dependencies §§ 89 et seq.

§ 11-45-9. Any property accrued to the state recovered.

In like manner as set forth in Section 11-45-7, an action may be prosecuted in all cases where property, real or personal, has accrued to the state by any forfeiture or otherwise.

HISTORY: Codes, 1857, ch. 17, art. 13; 1880, § 895; 1892, § 4252; 1906, § 4804; Hemingway's 1917, § 3168; 1930, § 6001; 1942, § 4391.

RESEARCH REFERENCES

Am. Jur.

72 Am. Jur. 2d, States, Territories, and Dependencies §§ 89 et seq.

CJS.

81A C.J.S., States §§ 529-531 et seq.

§ 11-45-11. The state entitled to all actions — unlawful detainer for its lands.

The state shall be entitled to bring all actions and all remedies to which individuals are entitled in a given state of case. It may maintain the action of unlawful entry and detainer in all cases, at its option, for the recovery of land.

HISTORY: Codes, 1880, § 897; 1892, § 4253; 1906, § 4805; Hemingway's 1917, § 3169; 1930, § 6002; 1942, § 4392.

Cross References — Duty of attorney general to represent state officers in suits brought by them in their official capacity, see § 7-5-39.

Who is entitled to summary remedy of unlawful entry and detainer, see § 11-25-1.

Statute of limitations in suits by and against state, see § 15-1-51.

Persons through which land commissioner may prosecute suits concerning public lands, see § 29-1-7.

Duty of land commissioner to institute and prosecute suits to cancel patents to lands fraudulently obtained or issued, and to recover possession of land, see § 29-1-9.

Disposition by land commissioner of private claims to public lands, see § 29-1-13.

Duty of land commissioner to protect public lands from trespass, see § 29-1-17.

Criminal offense of conspiracy to defraud state, see §§ 97-7-11 to 97-7-15.

JUDICIAL DECISIONS

1. In general.

A school district is an agent of the State, and therefore has within its authority all actions and all remedies to which an individual is entitled. *Harrison County v. Gulfport*, 557 So. 2d 780, 1990 Miss. LEXIS 44 (Miss. 1990).

A county board of education was an agent of the State, and therefore had the authority to object to a proposed annexation. The board of education was a party interested in, affected by or aggrieved by the proposed annexation within the meaning of § 21-1-31, where the territory sought to be annexed was served by schools administered by the county board of education. Additionally, the school board had the authority to exercise its standing and to employ counsel and participate fully in the annexation confirmation proceeding. *Harrison County v. Gulfport*, 557 So. 2d 780, 1990 Miss. LEXIS 44 (Miss. 1990).

A municipal separate school district

may bring suit for alleged damages resulting from the alleged faulty construction of a district's school building against the contractor, the architect, the bonding company, the sub-contractors, and the furnishers of building materials. *Grenada Municipal Separate School Dist. v. Jesco, Inc.*, 449 So. 2d 226, 1984 Miss. LEXIS 1707 (Miss. 1984).

Under the rule that where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally, the newly elected members of a county board of supervisors could not claim authority under Code 1942, § 2872, § 2944, § 2955, § 4392, or § 4394, to bring suit against the defeated members of the board and their sureties for allegedly illegally expended amounts, in view of the fact that Code 1942, § 9118-10 is specifically directed toward recovery of sums expended contrary to the mandate of

the county budget law, and the state auditor is expressly authorized to sue for such recovery. *Lincoln County v. Entrican*, 230 So. 2d 801, 1970 Miss. LEXIS 1565 (Miss. 1970).

The state has the right and power to file an action for the collection of unpaid privilege taxes and penalties thereon due the state and its political subdivisions by the use of the statutory remedy of an attachment at law without the giving of an attachment bond provided for by Code 1942, § 2680. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362, 1958 Miss. LEXIS 323 (Miss. 1958).

The state, county and municipality were the real parties in interest in a suit by the state for the collection of debts due the state and its political subdivisions as unpaid privilege taxes and penalties. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362, 1958 Miss. LEXIS 323 (Miss. 1958).

The state does not legally become a party to a suit brought on its behalf unless the suit is brought by some officer having statutory authority so to do and a suit brought by the state tax collector without authority is not binding on the state, and a decree therein is not res judicata against the state. *State v. Rogers*, 206 Miss. 643, 39 So. 2d 533, 1949 Miss. LEXIS 289 (Miss. 1949).

District attorney, with approval of attorney general, was authorized to maintain suit on behalf of county or district thereof against member of board of supervisors and his surety for unlawfully permitting a tractor and other construction equipment belonging to the county to be used for benefit of private individuals, to recover loss to the county arising from depreciation of such equipment, the illegal use of

gasoline and oil, and the expenditure of considerable sums for wages to its employees. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

The fact that the state tax collector had previously brought suit on behalf of the state to recover for removal of sand and gravel from tidewater lands was not res adjudicata as to a subsequent suit on the identical cause of action brought by the state attorney-general, since no jurisdiction could be acquired over the state in the prior suit by the unauthorized act of one of its officials in assuming to appear on its behalf. *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44, 1938 Miss. LEXIS 306 (Miss. 1938).

The state, as trustee for the people of the state, was entitled to recover the value of sand and gravel alleged to have been dredged for commercial purposes from the bed of bayou where the tide ebbed and flowed therein. *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44, 1938 Miss. LEXIS 306 (Miss. 1938).

The state may sue a county as trustee of the 16th section lands and compel an accounting and enforce payment to townships of their proper share. *Robertson v. Monroe County*, 118 Miss. 520, 79 So. 184, 1918 Miss. LEXIS 84 (Miss. 1918).

RESEARCH REFERENCES

ALR.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state. 81 A.L.R.3d 1239.

State's standing to sue on behalf of its citizens. 42 A.L.R. Fed. 23.

Am. Jur.

72 Am. Jur. 2d, States, Territories, and

Dependencies §§ 89 et seq.

CJS.

81A C.J.S., States §§ 529-531 et seq.

Law Reviews.

1984 Mississippi Supreme Court Review: Corporate, Contract and Commercial Law. 55 Miss. L. J. 65, March, 1985.

§ 11-45-13. Certain suits abated.

All suits which have by acts of the Legislature been heretofore abated shall continue so abated. All rights of action and causes of action which the state, or any officer for the use of the state may have had, where by act of the Legislature such right has been abrogated and the authority and right to bring suit thereon denied, such right shall continue so abrogated and such right and authority to bring suit thereon and therefor shall continue to be denied.

HISTORY: Codes, 1930, § 6003; 1942, § 4393.

§ 11-45-15. County to have like remedies.

Any county may have like remedies given to recover any property belonging to it, or damages for injury thereto; and action may be brought in behalf of the county by the county prosecuting attorney or by someone employed therefor by the board of supervisors.

HISTORY: Codes, 1880, § 896; 1892, § 4254; 1906, § 4806; Hemingway's 1917, § 3170; 1930, § 6004; 1942, § 4394; Laws, 1978, ch. 509, § 2, eff from and after January 1, 1980.

Cross References — Limitations of suits by and against state, counties and municipalities, see § 15-1-51.

Employment of counsel by county board of supervisors, see § 19-3-49.

JUDICIAL DECISIONS**1. In general.**

Under the rule that where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally, the newly elected members of a county board of supervisors could not claim authority under Code 1942, § 2872, § 2944, § 2955, § 4392, or § 4394, to bring suit against the defeated members of the board and their sureties for allegedly illegally expended amounts, in view of the fact that Code 1942, § 9118-10 is specifically directed toward recovery of sums expended contrary to the mandate of the county budget law, and the state auditor is expressly authorized to sue for such recovery. *Lincoln County v. Entrican*, 230 So. 2d 801, 1970 Miss. LEXIS 1565 (Miss. 1970).

If a district attorney may bring suit on behalf of a county, he may bring it where only part of the county is concerned. *Shumpert v. Lee County*, 197 Miss. 513, 20

So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

District attorney, with approval of attorney general, was authorized to maintain suit on behalf of county or district thereof against member of board of supervisors and his surety for unlawfully permitting tractor and other construction equipment belonging to the county to be used for benefit of private individuals, to recover loss to the county arising from depreciation of such equipment, the illegal use of gasoline and oil, and the expenditure of considerable sums for wages to its employees. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals.

Shumpert v. Lee County, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

This section [Code 1942, § 4394] does not authorize a county to bring an action of mandamus affecting public interest, as in the case of mandamus to compel the state highway commission to allow a county moneys expended in building a

bridge. Hancock County v. State Highway Com., 188 Miss. 158, 193 So. 808, 1940 Miss. LEXIS 15 (Miss. 1940).

A county may institute a suit against a railroad company for the conversion of negotiable bonds of the county issued in aid of the railroad. Board of Sup'rs v. Georgia P. R. Co., 11 So. 471 (Miss. 1892).

RESEARCH REFERENCES

Am. Jur.

56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 633, 698.

CJS.

20 C.J.S., Counties §§ 410, 411 et seq.

§ 11-45-17. County may sue and be sued.

Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; but suit shall not be brought by the county without the authority of the board of supervisors, except as otherwise provided by law.

HISTORY: Codes, 1857, ch. 59, art. 34; 1871, § 1384; 1880, § 2175; 1892, § 290; 1906 § 309; Hemingway's 1917, § 3682; 1930, § 270; 1942, § 2955.

Cross References — Limitations of suits by and against state, counties and municipalities, see § 15-1-51.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Suits by, or on behalf of, or in name of, county.
3. Suits against county.
4. —Venue.

1. In general.

A county had standing under § 21-1-31 to object to the annexation of county territory by a city since it was a party interested in, affected by or aggrieved by the annexations. Furthermore, a combined reading of §§ 11-45-17, 11-45-19, and 19-3-47(1)(b) vested in the county, acting by and through its board of supervisors, authority to exercise its standing and to employ counsel and participate fully in each annexation and confirmation proceeding. Harrison County v. Gulfport, 557

So. 2d 780, 1990 Miss. LEXIS 44 (Miss. 1990).

Under the rule that where a special and particular statute deals with a special and particular subject, its particular terms as to that special subject control over general statutes dealing with the subject generally, the newly elected members of a county board of supervisors could not claim authority under Code 1942, § 2872, § 2944, § 2955, § 4392, or § 4394, to bring suit against the defeated members of the board and their sureties for allegedly illegally expended amounts, in view of the fact that Code 1942, § 9118-10 is specifically directed toward recovery of sums expended contrary to the mandate of the county budget law, and the state auditor is expressly authorized to sue for such recovery. Lincoln County v. Entrican, 230 So. 2d 801, 1970 Miss. LEXIS 1565 (Miss. 1970).

In a suit against members of a county school board and county superintendent to compel them to provide transportation for children of the school district who were legally enrolled in a school located in another school district, plaintiffs in addition to being citizens, property owners and taxpayers were also fathers and mothers of the children who were denied transportation, had the right to bring the action. *Grenada County School Bd. v. Provine*, 224 Miss. 574, 80 So. 2d 798, 1955 Miss. LEXIS 523 (Miss. 1955).

2. Suits by, or on behalf of, or in name of, county.

Authority of board of supervisors is not necessary in suit by or on behalf of the county against individual member of the board. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

This section [Code 1942, § 2955] does not authorize a county to bring an action of mandamus affecting public interest, as in the case of mandamus to compel the state highway commission to allow a county moneys expended in building a bridge. *Hancock County v. State Highway Com.*, 188 Miss. 158, 193 So. 808, 1940 Miss. LEXIS 15 (Miss. 1940).

A private citizen cannot bring a suit on behalf of the county to challenge lease of its property. *American Oil Co. v. Interstate Wholesale Grocers, Inc.*, 138 Miss. 801, 104 So. 70, 1925 Miss. LEXIS 98 (Miss. 1925).

A suit brought in the name of the board of supervisors for the benefit of the county, instead of in the name of county, is merely a misnomer which should have been ob-

jected to in the trial court, and a failure to object then amounts to a waiver and precludes the defendant from raising the point on appeal. *National Surety Co. v. Board of Sup'rs*, 120 Miss. 706, 83 So. 8, 1919 Miss. LEXIS 125 (Miss. 1919).

A drainage district with power to sue and be sued is not required to bring a suit in the name of the county. *Robertson v. Thomas*, 118 Miss. 423, 79 So. 289, 1918 Miss. LEXIS 90 (Miss. 1918).

Where two or more officers are authorized to bring suit for the benefit of the county, the one first to bring suit takes control of it. *Robertson v. Bank of Batesville*, 116 Miss. 501, 77 So. 318, 1917 Miss. LEXIS 335 (Miss. 1917).

The board of supervisors may authorize, and the county can maintain, an action of replevin for logs cut for sale, and not for necessary estovers or for clearing so much of the land as a prudent owner in fee would clear for cultivation from sixteen sections leased in 1834 for ninety-nine years. *Board of Sup'rs v. Gans*, 80 Miss. 76, 31 So. 539 (Miss. 1902).

In a suit by a county plea of set-off is bad which fails to show that the claim sought to be set off has been presented to the board of supervisors and rejected. *State use of Noxubee County v. Banks*, 66 Miss. 431, 6 So. 184, 1889 Miss. LEXIS 122 (Miss. 1889).

While it is only in regard to matters in which the county is interested that boards of supervisors may sue, it cannot escape liability for costs and damages which it has caused by the wrongful suing out of an injunction. *Freeman v. Supervisors*, 66 Miss. 1, 5 So. 516, 1888 Miss. LEXIS 47 (Miss. 1888).

3. Suits against county.

Preliminary petition to county board of supervisors to institute or permit petitioners to institute a suit to test the legality of annexation of territory of one consolidated school district to an adjoining consolidated school district, is a prerequisite to the right of the petitioners to file such a suit. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759, 1953 Miss. LEXIS 471 (Miss. 1953).

Where a petition which asked county board of supervisors to institute or permit petitioners to institute a suit to test the legality of purported annexation of territory of one consolidated district to an adjoining consolidated district, had been filed but had not been acted upon, this was litigation within the meaning of the Validating Act of 1952 and act was inapplicable. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759, 1953 Miss. LEXIS 471 (Miss. 1953).

One to whom, as the lowest bidder, a county has awarded a contract for lumber to be used during the year, cannot maintain an action against the county for breach of contract in purchasing lumber from others. *Board of Sup'rs v. Payne*, 175 Miss. 12, 166 So. 332, 1936 Miss. LEXIS 10 (Miss. 1936).

The amount of damage recoverable by an abutting owner for abandoning a public highway is loss resulting from the depreciation in the fair market value of his land. *Jackson v. Monroe County*, 124 Miss. 264, 86 So. 769, 1920 Miss. LEXIS 505 (Miss. 1920).

The county will be liable for damages caused in constructing a road negligently under plans and specifications accepted and approved by the board where such work done according to contract has damaged plaintiff. *Covington County v. Watts*, 120 Miss. 428, 82 So. 309, 1919 Miss. LEXIS 102 (Miss. 1919).

Authority to bring suit against a county does not necessarily carry with it the means of enforcing a judgment, but when judgment is rendered it should be paid by appropriation from any available fund, but if the county has no available funds nor power to levy tax to pay the same the payment of such judgment must be provided for by legislative enactment. *Town of Crenshaw v. Panola County*, 115 Miss. 891, 76 So. 741, 1917 Miss. LEXIS 276 (Miss. 1917).

Counties are immune from liability to the same extent that the state is and unless statute authorizes a suit the county cannot be held liable. *City of Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682, 1917 Miss. LEXIS 267 (Miss. 1917).

Public property of a county cannot be sold under execution against a county. *City of Grenada v. Grenada County*, 115 Miss. 831, 76 So. 682, 1917 Miss. LEXIS 267 (Miss. 1917).

4. —Venue.

Where a wrongful death action accrued prior to the enactment of the Mississippi Torts Claims Act, the action against the county was properly transferred to a court in the county. *Boston v. Hartford Accident & Indem. Co.*, 822 So. 2d 239, 2002 Miss. LEXIS 119 (Miss. 2002), overruled in part, *Capital City Ins. Co. v. G.B. "Boots" Smith Corp.*, 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

In an action against the state and two counties to recover for the death of a prisoner, who was found hanging by a shoestring in a shower stall in a jail, the state was properly named as a defendant and, therefore, proper venue was determined by § 11-46-13, rather than by § 11-45-17. *Estate of Jones v. Quinn*, 716 So. 2d 624, 1998 Miss. LEXIS 296 (Miss. 1998).

County must be sued in court having jurisdiction of amount sitting at county site, though another person is named as joint defendant. *Simpson v. Neshoba County*, 157 Miss. 217, 127 So. 692, 1930 Miss. LEXIS 267 (Miss. 1930).

Where a county deprives an abutting owner of access to his farm by vacating a county road, the county is liable for damages. *Morris v. Covington County*, 118 Miss. 875, 80 So. 337, 1918 Miss. LEXIS 142 (Miss. 1918); *Jackson v. St. Louis & S. F. R. Co.*, 120 Miss. 149, 81 So. 796, 1919 Miss. LEXIS 72 (Miss. 1919).

RESEARCH REFERENCES

ALR.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

Sufficiency of notice of claim against

local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

Am. Jur.

56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 633, 698.

13 Am. Jur. Legal Forms 2d, Municipal, School and State Tort Liability, §§ 181:34-181:36 (claims).

18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other

Political Subdivisions, Forms 91 et seq. (notice and presentation of claims).

18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 101 et seq. (compromise or settlement of claims).

18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 111 et seq. (actions on claims).

CJS.

20 C.J.S., Counties §§ 414, 415 et seq.

§ 11-45-19. Suit where part only of county is interested.

Suit may be brought, in the name of the county, where only a part of the county or of its inhabitants are concerned, and where there is a public right of such part to be vindicated.

HISTORY: Codes, 1892, § 291; 1906, § 310; Hemingway's 1917, § 3683; 1930, § 271; 1942, § 2956.

Cross References — Statute of limitations in suits by and against counties, see § 15-1-51.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular actions.

1. In general.

Authorization by board of supervisors of district of county was not required before bringing suit by district attorney on behalf of the county or district against a member of the board for loss resulting from his unauthorized action in permitting county's construction equipment to be used for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

If a district attorney may bring suit on behalf of a county, he may bring it where only part of the county is concerned. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82, 1944 Miss. LEXIS 316 (Miss. 1944).

2. Particular actions.

A county had standing under § 21-1-31 to object to the annexation of county ter-

ritory by a city since it was a party interested in, affected by or aggrieved by the annexations. Furthermore, a combined reading of §§ 11-45-17, 11-45-19, and 19-3-47(1)(b) vested in the county, acting by and through its board of supervisors, authority to exercise its standing and to employ counsel and participate fully in each annexation and confirmation proceeding. *Harrison County v. Gulfport*, 557 So. 2d 780, 1990 Miss. LEXIS 44 (Miss. 1990).

In a suit against members of a county school board and county superintendent to compel them to provide transportation for children of the school district who were legally enrolled in a school located in another school district, plaintiffs in addition to being citizens, property owners and taxpayers were also fathers and mothers of the children who were denied transportation, and had the right to bring the action. *Grenada County School Bd. v. Provine*, 224 Miss. 574, 80 So. 2d 798, 1955 Miss. LEXIS 523 (Miss. 1955).

Preliminary petition to county board of supervisors to institute or permit petition-

ers to institute a suit to test the legality of annexation of territory of one consolidated school district to an adjoining consolidated school district, is a prerequisite to the right of the petitioners to file such a suit. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759, 1953 Miss. LEXIS 471 (Miss. 1953).

Where a petition which asked county board of supervisors to institute or permit petitioners to institute a suit to test the legality of purported annexation of territory of one consolidated district to an adjoining consolidated district, had been filed but had not been acted upon, this was litigation within the meaning of the Validating Act of 1952 and act was inapplicable. *Hopkins v. Lee*, 217 Miss. 624, 64 So. 2d 759, 1953 Miss. LEXIS 471 (Miss. 1953).

A bill in name of individual taxpayers and patrons of consolidated line school

district complaining of order of A. county school board transferring A. county pupils of line school to other schools within A. county did not lie, where there was no allegation of any special claim or interest of complainants as compared with balance of taxpayers and patrons of district and no allegation that county board of supervisors had been asked and had refused to vindicate complainants' rights. *Storey v. Rhodes*, 178 Miss. 776, 174 So. 560, 1937 Miss. LEXIS 263 (Miss. 1937), but see *Grenada Municipal Separate School Dist. v. Jesco, Inc.*, 449 So. 2d 226, 1984 Miss. LEXIS 1707 (Miss. 1984).

County held to have sufficient interest in suit to compel admission of Chinese children into white schools to warrant allowance to state's attorney-general for counsel to defend suit. *Coahoma County v. Knox*, 173 Miss. 789, 163 So. 451, 1935 Miss. LEXIS 259 (Miss. 1935).

§ 11-45-21. Bond not to be required.

Neither the state nor any county shall be required to give bond in any suit.

HISTORY: Codes, 1880, § 897; 1892, § 4255; 1906, § 4807; Hemingway's 1917, § 3171; 1930, § 6005; 1942, § 4395.

Cross References — State and local governments, and officials thereof, not having to give appeal bond on appeals, see § 11-51-101.

JUDICIAL DECISIONS

1. In general.

An action by the state for the collection of debts due to the state and its political subdivisions as unpaid privilege taxes and penalties thereon was a suit within the meaning of this section [Code 1942, § 4395]. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362, 1958 Miss. LEXIS 323 (Miss. 1958).

The state, county and municipality are the real parties in interest in a suit by the state for the collection of debts due the state and its political subdivisions as un-

paid privilege taxes and penalties. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362, 1958 Miss. LEXIS 323 (Miss. 1958).

The state has the right to file action for the collection of unpaid privilege taxes and the interest thereon due the state and its political subdivisions by the use of the statutory remedy of an attachment at law without the giving of an attachment bond provided for by Code 1942, § 2680. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362, 1958 Miss. LEXIS 323 (Miss. 1958).

§ 11-45-23. Property recovered delivered to agent.

When the state or any county, shall recover property by suit, the possession of the property shall be delivered to such officer, agent or representative

of the state or county as may be designated by proper authority to receive it, or having right to its custody for the state or county.

HISTORY: Codes, 1880, § 898; 1892, § 4256; 1906, § 4808; Hemingway's 1917, § 3172; 1930, § 6006; 1942, § 4396.

§ 11-45-25. Suits by and against municipalities.

A municipality may sue and be sued by its corporate name. Suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one (1) county. In a case where a county has two (2) judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located. In cases where a municipality is located in two (2) counties, such suits shall be brought in the county in which the principal office of the municipality is located. As to justice court actions, the same shall be brought in the county in which the municipality or its principal office is located.

HISTORY: Codes, 1892, § 2912; 1906, § 3300; Hemingway's 1917, § 5796; 1930, § 2370; 1942, § 3374-02; Laws, 1938, ch. 335; Laws, 1950, ch. 491, § 2; Laws, 1981, ch. 471, § 39; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — Location for bringing suits within jurisdiction of justice of the peace, see § 11-9-101.

Limitations of suits by and against state, counties and municipalities, see § 15-1-51.

For another section derived from same 1942 code section, see § 21-1-5.

Establishment of police courts in municipalities, see §§ 21-23-1 et seq.

Claims by or against municipalities, generally, see §§ 21-39-5 et seq.

JUDICIAL DECISIONS

ANALYSIS

I. Under Current Law.

1. Venue.

2.-5. [Reserved for future use.]

II. Under Former Law.

6. In general.

I. Under Current Law.

1. Venue.

In an action against the state and two counties to recover for the death of a prisoner, who was found hanging by a shoestring in a shower stall in a jail, the state was properly named as a defendant and, therefore, proper venue was determined by § 11-46-13, rather than by § 11-45-25. *Estate of Jones v. Quinn*, 716 So. 2d 624, 1998 Miss. LEXIS 296 (Miss. 1998).

2.-5. [Reserved for future use.]

II. Under Former Law.

6. In general.

A judgment in mandamus rendered against the mayor and board of aldermen

of the municipality instead of the municipality itself is not for such reason void. *Town of Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 1910 Miss. LEXIS 247 (Miss. 1910).

A municipality is not subject to garnishment for the wages of employees where the same are exempt, and it is the duty of the municipality to set up the facts in its answer to the writ of garnishment. *City of Laurel v. Turner*, 80 Miss. 530, 31 So. 965, 1902 Miss. LEXIS 281 (Miss. 1902).

A municipality, unless subjected thereto by statute, is not liable to suit by garnishment or otherwise for debts arising from its exercise of governmental functions. *Clarksdale Compress & Storage Co. v. W. R. Caldwell Co.*, 80 Miss. 343, 31 So. 790, 1902 Miss. LEXIS 254 (Miss. 1902).

A plaintiff or complainant who seeks to subject a municipality to garnishment on the ground that its debt to the defendant was contracted in its private capacity, and not for the exercise of governmental functions, must show the nature of the transaction, and the facts which render it amenable to the process. *Clarksdale Compress & Storage Co. v. W. R. Caldwell Co.*, 80 Miss. 343, 31 So. 790, 1902 Miss. LEXIS 254 (Miss. 1902).

RESEARCH REFERENCES

ALR.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Insufficiency of notice of claim against municipality as regards statement of place where accident occurred. 69 A.L.R.4th 484.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

Am. Jur.

56 Am. Jur. 2d, Municipal Corporations,

Counties, and Other Political Subdivisions, § 630, 675.

Notice and presentation of claims, 18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 91 et seq.

Compromise or settlement of claims, 18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 101 et seq.

Actions on claims, 18 Am. Jur. Pl & Pr Forms (Rev), Municipal Corporations, Counties, and Other Political Subdivisions, Forms 111 et seq.

18 Am. Jur. Pl & Pr Forms (Rev), Municipal, School, and State Tort Liability, Forms 1 et seq.

Claims, 13 Am. Jur. Legal Forms 2d, Municipal, School, and State Tort Liability, §§ 181:34-181:36.

CJS.

64 C.J.S., Municipal Corporations

§§ 2541-2546 et seq.

CHAPTER 46.**IMMUNITY OF STATE AND POLITICAL SUBDIVISIONS
FROM LIABILITY AND SUIT FOR TORTS AND TORTS
OF EMPLOYEES**

Sec.

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| 11-46-1. | Definitions. |
| 11-46-3. | Declaration of legislative intent. |
| 11-46-5. | Waiver of immunity; course and scope of employment; presumptions. |
| 11-46-6. | Repealed. |
| 11-46-7. | Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee. |
| 11-46-8. | Foster parents covered under this chapter. |
| 11-46-9. | Exemption of governmental entity from liability on claims based on specified circumstances. |
| 11-46-11. | Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind. |
| 11-46-13. | Jurisdiction; appeals; venue. |
| 11-46-15. | Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award. |
| 11-46-16. | Expired. |
| 11-46-17. | Creation of Tort Claims Fund; liability insurance. |
| 11-46-18. | Mississippi Tort Claims Board; membership; payment of expenses; officers; meetings. |
| 11-46-19. | Powers and duties of board. |
| 11-46-20. | Tort Claims Board; regulation of liability coverage of governmental entities; annual review of insurance plans; other powers; fees. |
| 11-46-21. | Repealed. |
| 11-46-23. | Provisions of chapter independent and severable. |

§ 11-46-1. Definitions.

As used in this chapter, the following terms shall have the meanings ascribed unless the context otherwise requires:

(a) "Claim" means any demand to recover damages from a governmental entity as compensation for injuries.

(b) "Claimant" means any person seeking compensation under the provisions of this chapter, whether by administrative remedy or through the courts.

(c) "Board" means the Mississippi Tort Claims Board.

(d) "Department" means the Department of Finance and Administration.

(e) "Director" means the executive director of the department who is also the executive director of the board.

(f) "Employee" means any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political

subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without compensation, including firefighters who are members of a volunteer fire department that is a political subdivision. The term “employee” shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or a political subdivision; and

(i) For purposes of the limits of liability provided for in Section 11-46-15, the term “employee” shall include:

1. Physicians under contract to provide health services with the State Board of Health, the State Board of Mental Health or any county or municipal jail facility while rendering services under the contract;

2. Any physician, dentist or other health care practitioner employed by the University of Mississippi Medical Center (UMMC) and its departmental practice plans who is a faculty member and provides health care services only for patients at UMMC or its affiliated practice sites, including any physician or other health care practitioner employed by UMMC under an arrangement with a public or private health-related organization;

3. Any physician, dentist or other health care practitioner employed by any university under the control of the Board of Trustees of State Institutions of Higher Learning who practices only on the campus of any university under the control of the Board of Trustees of State Institutions of Higher Learning;

4. Any physician, dentist or other health care practitioner employed by the State Veterans Affairs Board and who provides health care services for patients for the State Veterans Affairs Board;

(ii) The term “employee” shall also include Mississippi Department of Human Services licensed foster parents for the limited purposes of coverage under the Tort Claims Act as provided in Section 11-46-8; and

(iii) The term “employee” also shall include any employee or member of the governing board of a charter school but shall not include any person or entity acting in the capacity of an independent contractor to provide goods or services under a contract with a charter school.

(g) “Governmental entity” means the state and political subdivisions.

(h) “Injury” means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that is actionable at law or in equity.

(i) “Political subdivision” means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including, but not limited to, any county, municipality, school district, charter school, volunteer fire department that is a chartered nonprofit corporation providing emergency services under contract with a county or municipality, community hospital as defined in Section 41-13-10, airport authority, or other instrumentality of the state, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(j) “State” means the State of Mississippi and any office, department, agency, division, bureau, commission, board, institution, hospital, college, university, airport authority or other instrumentality thereof, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(k) “Law” means all species of law, including, but not limited to, any and all constitutions, statutes, case law, common law, customary law, court order, court rule, court decision, court opinion, court judgment or mandate, administrative rule or regulation, executive order, or principle or rule of equity.

HISTORY: Laws, 1984, ch. 495, § 1; reenacted without change, Laws, 1985, ch. 474, § 1; Laws, 1988, ch. 479, § 2; Laws, 1993, ch. 476, § 1; Laws, 1999, ch. 518, § 1; Laws, 2002, 3rd Ex. Sess., ch. 2, § 2; Laws, 2013, ch. 385, § 1; Laws, 2013, ch. 497, § 32; brought forward without change, Laws, 2016, ch. 367, § 2; Laws, 2017, ch. 398, § 3, eff from and after July 1, 2017.

Joint Legislative Committee Note — Section 1 of ch. 385, Laws of 2013, effective from and after passage (approved March 20, 2013), amended this section. Section 32 of ch. 497, Laws of 2013, effective from and after July 1, 2013 (approved April 17, 2013), also amended this section. As set out above, this section reflects the language of Section 32 of ch. 497, Laws of 2013, pursuant to Section 1-3-79, which provides that whenever the same section of law is amended by different bills during the same legislative session, the amendment with the latest effective date shall supersede all other amendments to the same section taking effect on an earlier date.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in (i) by substituting “contract with a county or municipality, community hospital” for “contract with a county or municipality community hospital.” The Joint Committee ratified the correction at its August 1, 2013, meeting.

Editor’s Notes — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

Laws of 2013, ch. 385, § 6, effective March 20, 2013, provides:

“SECTION 6. This act shall take effect and be in force from and after its passage [approved March 20, 2013]; volunteer fire departments shall have until July 1, 2013, to obtain and have approved the insurance policies of self-insurance reserves or combination thereof required for political subdivisions under the Tort Claims Act.”

Laws of 2017, ch. 398, § 6, provides:

“SECTION 6. The provisions of this act are severable. If any part is declared invalid or unconstitutional, that declaration shall not affect the part which remains.”

Cross References — Immunity from suit of political subdivisions as they are defined in this section, see § 11-46-3.

Applicability of sections 11-46-1 et seq. to community hospitals, their owners, and their boards of trustees, see § 41-13-11.

Applicability of §§ 11-46-1 et seq. to causes of action arising out of any wrongful act or omission in connection with an activity or operation of a hospital, nursing home or other community hospital facility or community health program, see § 41-13-11.

Application of this chapter to actions by and against electric utilities arising out of

injuries resulting from contact with high voltage overhead lines, see § 45-15-13.

“State” or a “political subdivision,” as defined in this section, as being an employer subject to the Workers’ Compensation Law, see § 71-3-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability.
3. Constitutionality.
4. Employee.
5. Political subdivision.
6. Dismissal of claim.
7. Expert testimony.
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1. In general.

Former directors and officers of a bankrupt debtor were not immune from liability under the Mississippi Tort Claims Act because the Act did not bind the hands of the sovereign from pursuing any civil claim inasmuch as the Act did not refer to claims “by” the sovereign, its application came about only as to claims “against” the sovereign, and the debtor was a governmental entity, not seeking compensation under the provisions of the Act. *Lefoldt v. Rentfro*, 241 So. 3d 565, 2017 Miss. LEXIS 456 (Miss. 2017).

Language of the immunity granted by the Mississippi Workers’ Compensation Self-Insurer Guaranty Association Law is different and significantly more restrictive than the immunities granted by the Mississippi Tort Claims Act. *Former Bd. of Trs. & Members of Miss. Comp Choice Self-Insurers Fund v. Miss. Workers’ Comp. Group Self-Insurer Guar. Ass’n*, 157 So. 3d 820, 2014 Miss. LEXIS 571 (Miss. 2014).

Where a nurse working at an adult detention center witnessed a sheriff’s department employee beat an inmate and cause injuries that ultimately led to the inmate’s death, the nurse failed to state a claims against the County for common law negligence and negligence under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to -23 (Supp. 2010) because the nurse failed to establish a breach of any duty owed her by the County. *Smith v. Harrison County*, 67 So.

3d 815, 2011 Miss. App. LEXIS 363 (Miss. Ct. App. 2011).

In an action brought under the Mississippi Tort Claims Act, plaintiff failed to prove that an ambulance driver was negligent as a matter of law in operating an ambulance during an emergency when she ran over plaintiff’s foot and caused him to suffer damages. *Albright v. Delta Reg’l Med. Ctr.*, 899 So. 2d 897, 2004 Miss. App. LEXIS 909 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 273 (Miss. 2005).

In the context of actions pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 to 11-46-23, the common thread running through cases where an officer acts with reckless disregard in operating a motor vehicle is an appreciation of the unreasonable risk of the danger involved coupled with a conscious indifference to the consequences that are certain to follow. *Davis v. Latch*, 873 So. 2d 1059, 2004 Miss. App. LEXIS 445 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment for defendants in a medical malpractice case where, since the hospital was protected by the Mississippi Tort Claims Act (MTCA), the husband had to meet the requirements of Miss. Code Ann. § 11-46-11; he did not substantially comply with the MTCA requirements; plaintiff filed his complaint after the one-year statute of limitations had expired. *Davis v. Hoss*, 869 So. 2d 397, 2004 Miss. LEXIS 319 (Miss. 2004).

Chancery court lacked subject matter jurisdiction to consider the individuals’ claims brought pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. against the Mississippi Municipality Liability Plan, for injuries suffered as the result of a motor vehicle accident with a city police officer, as Miss. Const. Art. 6, §§ 159 & 161 did not include actions under the MTCA; rather, the circuit court had jurisdiction over the matter pursuant to Miss. Const.

Art. 6, § 156. *Miss. Mun. Liab. Plan v. Jordan*, 863 So. 2d 934, 2003 Miss. LEXIS 875 (Miss. 2003).

Where a widow filed an action against a city, its police chief, and two police officers, arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint as to her claim under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. because she had specified and separated the negligence-and tort-based state law claims from the constitutional tort claims brought pursuant to 42 U.S.C.S. § 1983 in her amended complaint; the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers; and Miss. R. Civ. P. 8(a) only required that notice of a claim be given. *Elkins v. McKenzie*, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Because the only claim for equitable relief in a negligence action brought under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, was a request for an accounting, the proper jurisdiction was in a circuit court, and not in chancery court. *City of Ridgeland v. Fowler*, 846 So. 2d 210, 2003 Miss. LEXIS 57 (Miss. 2003).

The clear intent of the legislature in enacting this chapter was to immunize the state and its political subdivisions from any tortious conduct, including tortious breach of implied term or condition of any warranty or contract; however, the provisions of this chapter have no application to a pure breach of contract action. *City of Grenada v. Whitten Aviation, Inc.*, 755 So. 2d 1208, 1999 Miss. App. LEXIS 499 (Miss. Ct. App. 1999).

This chapter does not proscribe actions against the state for the return of private property allegedly wrongfully acquired by the state or its agencies or institutions. *Greyhound Welfare Found. v. Mississippi State Univ.*, 736 So. 2d 1048, 1999 Miss. LEXIS 155 (Miss. 1999).

Negligence cause of action against municipality, arising after *Pruett* decision abolishing judicially-created sovereign immunity but before *Presley* decision prospectively holding unconstitutional the tort claims act provision stating sovereign

immunity provisions were not yet effective, was governed by pre-*Pruett* common law. (Per *Mills*, J., with three justices concurring and three justices concurring in the result). *Hord v. City of Yazoo City*, 702 So. 2d 121, 1997 Miss. LEXIS 626 (Miss. 1997).

Physicians and other medical personnel at state prison, against whom action was brought following death of prisoner, were not the "state" or its "political subdivisions", and thus did not come within scope of statute under which state and its political subdivisions are not, have never been, and shall not be liable and are entitled to immunity. *Sparks v. Kim*, 701 So. 2d 1113, 1997 Miss. LEXIS 619 (Miss. 1997).

Codification of principles of sovereign immunity did not violate Mississippi constitutional provision that courts shall be open and remedy shall be available for every injury; remedy clause is not absolute guarantee of trial and it is legislature's decision whether or not to address restrictions upon actions against government entities. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

Codification of principles of sovereign immunity did not violate due process clause of Fourteenth Amendment; there was no right to sue state or its political subdivisions at common law and, through codification, legislature continued to withhold such right, and thus there was no property right to sue state. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

The decision of *Presley v. Mississippi State Highway Commission* (Miss. 1992) 608 So. 2d 1288, which declared the codified principle of sovereign immunity (§§ 11-46-1 et seq.) unconstitutional, has no retroactive application. *Robinson v. Stewart*, 655 So. 2d 866, 1995 Miss. LEXIS 223 (Miss. 1995).

There is no "property right" to sue the State, since the Mississippi Legislature has withheld that right through its statutes, and therefore the principle of sovereign immunity, as enacted by the legislature in §§ 11-46-1 et seq., does not violate the due process clause of the Mississippi Constitution or the 14th Amendment to the United States Constitution. *Robinson*

v. Stewart, 655 So. 2d 866, 1995 Miss. LEXIS 223 (Miss. 1995).

The Mississippi Legislature's post-Pruett legislative enactments on sovereign immunity (§§ 11-46-1 et seq.) do not violate the remedy clause of the Mississippi Constitution. Robinson v. Stewart, 655 So. 2d 866, 1995 Miss. LEXIS 223 (Miss. 1995).

The governmental immunity and tort claims act should not be construed to immunize governmental authorities and agencies from suits other than for money damages. Fordice v. Thomas, 649 So. 2d 835, 1995 Miss. LEXIS 34 (Miss. 1995), but see USPCI of Mississippi v. State ex rel. McGowan, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

The decision of the Supreme Court declaring unconstitutional the portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) mandating that all claims against the State be governed by case law governing sovereign immunity as it existed on November 10, 1982, applies prospectively only, and is "purely prospective" so that it applies only to claims arising after the mandate issues. Presley v. Mississippi State Highway Com., 608 So. 2d 1288, 1992 Miss. LEXIS 581 (Miss. 1992).

To the extent that § 11-46-6 [Repealed] purports to freeze the doctrine of sovereign immunity to the state of development of the common law prior to Pruet v. City of Rosedale (Miss. 1982) 421 So. 2d 1046, it is void; the State is immunized from claims arising thereafter to the extent that the Supreme Court would do so applying the evolving standards of common law, including any extensions or contractions of the doctrine deemed appropriate, on a case by case basis and to the extent that those benefitting by the immunity did not prepare themselves by acquiring insurance policies covering the liability in question in the event that immunity did not obtain. Presley v. Mississippi State Highway Com., 608 So. 2d 1288, 1992 Miss. LEXIS 581 (Miss. 1992).

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in Pruet v. City of Rosedale (Miss.

1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. Presley v. Mississippi State Highway Com., 608 So. 2d 1288, 1992 Miss. LEXIS 581 (Miss. 1992).

State Highway Commission is alter ego of state and shares in state's Eleventh Amendment immunity from suit in federal court. Brady v. Michelin Reifenwerke, 613 F. Supp. 1076, 1985 U.S. Dist. LEXIS 17616 (S.D. Miss. 1985).

2. Applicability.

When a father who was denied access to a settlement agreement in a suit filed on behalf of the father's injured child under the Mississippi Tort Claims Act (Act) sued a court clerk, the father was not required to serve the clerk as provided in the Act because the father's request for access to the settlement agreement was not a "claim" under the Act. Ewing v. Neese, 199 So. 3d 681, 2016 Miss. LEXIS 344 (Miss. 2016).

Ambulance service was entitled to Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., protections because the ambulance service was an instrumentality of governmental entities, specifically a city, a county, and a county general hospital, as the operations of the ambulance service were overwhelmingly controlled by the governmental entities, which owned the ambulance service. Woodall v. AAA Ambulance Serv., 161 So. 3d 1071, 2015 Miss. LEXIS 188 (Miss. 2015).

Given the context of the relationship between the manager and the nursing home, there was no genuine issue of material fact regarding whether the manager was an "instrumentality" of the nursing home; as an instrumentality of a community hospital, the manager was entitled to the protections, limitations, and immunities of the Mississippi Tort Claims Act. Estate of Fedrick v. Quorum Health Res., Inc., 2008 Miss. App. LEXIS 672 (Miss. Ct. App. Nov. 4, 2008), rev'd, 45 So. 3d 641, 2010 Miss. LEXIS 363 (Miss. 2010).

Sections 11-46-1 et seq., applied to a case where the event giving rise to the action occurred on June 1, 1994, clearly after the Act went into effect. Henderson

v. Un-Named Emergency Room, 758 So. 2d 422, 2000 Miss. LEXIS 79 (Miss. 2000), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Trial court, on remand, had to determine whether at the time of the alleged negligent conduct, the doctor was an employee of a state entity covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1; if so, the trial court had to further determine whether the statute of limitations had run as to the doctor as prescribed by Miss. Code Ann. § 11-46-11. *McClain v. Clark*, 992 So. 2d 636, 2008 Miss. LEXIS 515 (Miss. 2008).

Finding against the student in her action against a state university and a professor after she suffered a third-degree burn at an iron pour demonstration was improper because the state university, falling within the coverage of Miss. Code Ann. § 11-46-1(j), was not protected by discretionary function immunity and was liable for the professor's negligence pursuant to the waiver of sovereign immunity; it was difficult to fathom how the professor's failure to put down dry sand before the pour involved a policy judgment of a social, political, or economic nature. *Pritchard v. Von Houten*, 960 So. 2d 568, 2007 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 391 (Miss. 2007).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was proper pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 402 because an expert's testimony tended to make the fact that the city negligently repaired and maintained the grate and sidewalk more probable than that without his proffered evidence. *City of Natchez v. Jackson*, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 (Miss. Ct. App. 2006).

Finding in favor of the hospital in the patient's action under the Mississippi Tort Claims Act was proper because the patient failed to prove that the treatment he received was the proximate cause of his alleged injuries. *Lander v. Singing River Hosp. Sys.*, 933 So. 2d 1043, 2006 Miss. App. LEXIS 523 (Miss. Ct. App. 2006).

Dismissal of the decedent's mother's and a student's action against a state university resulting from a shooting on campus was appropriate under Miss. Code Ann. § 11-46-1 et seq. because the shooting of the victims was not the harm that would have otherwise resulted from failing to log the gunman in on campus; additionally, there was no authority that the university, through an employee, had a duty to warn the victims of the dangerous condition of the gunman's character. *Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 2006 Miss. App. LEXIS 406 (Miss. Ct. App. 2006).

Police did not have immunity from suit where a police officer acted recklessly in initiating a police chase of a suspect where the chase was not because a serious crime had just been committed; the vehicles exceeded the speed limit in a residential neighborhood, in the dark, with a low probability of apprehending the suspect, as he was known as someone who would flee and had successfully fled in the past. *City of Ellisville v. Richardson*, 913 So. 2d 973, 2005 Miss. LEXIS 275 (Miss. 2005).

Miss. Code Ann. § 11-46-3 granted immunity to the state and its political subdivisions for breach of implied term or condition of any warranty or contract. Thus, although the decedent was indeed a third-party beneficiary of the written contract between the city and the development district, her estate was not permitted to pursue claims of breach of implied terms of that contract against the city or its political subdivisions. *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 2005 Miss. LEXIS 298 (Miss. 2005).

Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, did not provide immunity for a city that neglected to inspect or maintain a city ditch; business was entitled to damages when, during a heavy rain, the ditch flooded, causing property damage. *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 2005 Miss. LEXIS 219 (Miss. 2005).

Denial of the general hospital's and physicians' motion to transfer venue in a medical malpractice action was improper under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., where the general hospital was en-

titled to a venue in the county in which the principal offices were located, Miss. Code Ann. § 11-11-3(1), because the decedent's heirs failed to assert a reasonable claim of liability against the medical center and treating physicians. *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Personal injury plaintiffs' motion for a remand of the matter to state court was granted because it could not be stated that the Mississippi Department of Transportation (MDOT) was fraudulently joined as a defendant in the action simply to defeat diversity jurisdiction, particularly when the MDOT could be held potentially liable to plaintiffs under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Johnson v. James Constr. Group, LLC*, 306 F. Supp. 2d 654, 2004 U.S. Dist. LEXIS 2597 (S.D. Miss. 2004).

Department of Public Safety was not immune from liability in a suit by a driver. A state trooper, who was speeding excessively, acted in reckless disregard of the driver's safety. *Miss. Dep't of Pub. Safety v. Durn*, 861 So. 2d 990, 2003 Miss. LEXIS 871 (Miss. 2003).

Under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., whether governmental conduct was discretionary required a two-prong analysis: (1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment involved social, economic or political policy alternatives, and, conversely, governmental conduct was ministerial if imposed by law, and its performance was not dependent on the employee's judgment. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

While parole supervision procedures appeared to be ministerial in nature, a field officer's responsibilities to monitor and supervise a parolee were immune from suit in cases where the State had no indication of a specific threat on a parolee's part to harm an individual. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

The University of Mississippi Medical Center and the University Anesthesia Services Practice Group (UAS) estab-

lished in connection with the Medical Center are instrumentalities of the State of Mississippi within the meaning of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23 and, as such, waived their immunity against a claim for medical malpractice liability only to the extent that UAS had purchased liability insurance; further, a staff anesthesiologist who participated in an operation in which a child suffered brain damage while sedated was an employee of the Center entitled to immunity despite also being a member of UAS and despite the fact that the doctor had personal liability insurance. *Mozingo v. Scharf*, 828 So. 2d 1246, 2002 Miss. LEXIS 315 (Miss. 2002).

3. Constitutionality.

The fact that the parties disagreed as to whether an individual was an employee within the meaning of the statute did not mean the statute's definition was constitutionally vague. *Smith v. Braden*, 765 So. 2d 546, 2000 Miss. LEXIS 201 (Miss. 2000).

The Tort Claims Act does not violate the right to due process by depriving persons of their day in court as there is no property right to sue the state. *Smith v. Braden*, 765 So. 2d 546, 2000 Miss. LEXIS 201 (Miss. 2000).

The Tort Claims Act does not violate the right to equal protection by protecting a physician employed by the state, while not protecting other physicians practicing medicine in Mississippi. The relevant question is whether the plaintiff, rather than the defendant, is treated differently from others that are similarly situated. *Smith v. Braden*, 765 So. 2d 546, 2000 Miss. LEXIS 201 (Miss. 2000).

Sections 11-46-1 to 11-46-23 do not violate the constitutional requirements that courts be open and that a remedy be available for every injury since the remedy clause is not an absolute guarantee of trial and it is the legislature's decision whether to address restrictions upon actions against government entities. *Quinn v. Mississippi State Univ.*, 720 So. 2d 843, 1998 Miss. LEXIS 328 (Miss. 1998), overruled in part, *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 2005 Miss. LEXIS 298 (Miss. 2005).

The court rejected the contention that the Sovereign Immunity Act is unconstitutional as it pertains to claims arising between April 1, 1993, and October 1, 1993. *Chamberlin v. City of Hernando*, 716 So. 2d 596, 1998 Miss. LEXIS 295 (Miss. 1998).

4. Employee.

In a medical malpractice action, summary judgment was properly granted in favor of defendant doctor because he was employed by an entity covered by the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23 (2002), and was thus afforded the MTCA's protection and because plaintiff patient failed to provide a timely notice of the claim under the MTCA. Because MTCA's one-year statute of limitations had expired, the patient was barred from asserting a claim for the wrongful death of her 10-month-old son. *Gorton v. Rance*, 52 So. 3d 351, 2011 Miss. LEXIS 62 (Miss. 2011).

Although a patient alleged that he was injured by the negligence of a doctor who was an independent contractor of a hospital, the Mississippi Tort Claims Act provided immunity to the state and its political subdivisions, such as the hospital, for the negligence of its independent contractors. Therefore, the trial court properly entered summary judgment in favor of the hospital. *Brown v. Delta Reg'l Med. Ctr.*, 997 So. 2d 195, 2008 Miss. LEXIS 498 (Miss. 2008).

Plaintiff VA patient conceded that a vascular surgeon was a state employee, and despite the patient's arguments to the contrary, the court found that there was no genuine issue of material fact that at the pertinent time, the surgeon was acting within the course and scope of his duties as a state employee, under Miss. Code Ann. §§ 11-46-5(3), 11-46-7(7), and, thus, immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 et seq. His involvement with the patient was solely by virtue of his being on-call pursuant to his employment with the university and its relationship to the VA facility. *Creel v. United States*, 512 F. Supp. 2d 574, 2007 U.S. Dist. LEXIS 39306 (S.D. Miss. 2007), rev'd, 598 F.3d 210, 2010 U.S. App. LEXIS 4252 (5th Cir. Miss. 2010).

Pursuant to Miss. Code Ann. § 11-46-1(f) and Miller factors, the doctor was an employee of the state hospital and the state for purposes of liability under the Mississippi Tort Claims Act; therefore, summary judgment was properly granted in favor of the doctor on the husband's wrongful death and medical malpractice claims. *Barksdale v. Carroll*, 944 So. 2d 107, 2006 Miss. App. LEXIS 638 (Miss. Ct. App.), cert. denied, 946 So. 2d 368, 2006 Miss. LEXIS 697 (Miss. 2006).

Doctor acted as an employee of the state of Mississippi when he treated the patient; therefore, the doctor was entitled to immunity as provided in the Mississippi Tort Claims Act and the trial court erred when it denied the doctor's motion for summary judgment. *Meeks v. Miller*, 956 So. 2d 942, 2006 Miss. App. LEXIS 500 (Miss. Ct. App. 2006), aff'd, 956 So. 2d 864, 2007 Miss. LEXIS 281 (Miss. 2007).

According to the plain language of Miss. Code Ann. § 11-46-1(f), the State intends to protect part-time workers, full-time workers, salaried employees, and uncompensated employees. The purpose of the Mississippi Torts Claim Act (MTCA) is to provide immunity to the physicians who are acting on behalf of the State or a political subdivision in any official capacity, temporarily or permanently, in the service of the State or a political subdivision, whether with or without compensation; the 2002 amendment to Miss. Code Ann. § 11-46-1 was not intended as an additional restriction to exclude certain physicians, but, rather, the addition was meant to assure that the physicians who were members of the departmental practice plans were fully protected under the MTCA. Thus, the appellate court was unable to conclude that the doctor (who was being sued by decedent's husband) was not an employee, merely because he did not belong to the departmental practice plan; an uncompensated, part-time physician at University of Mississippi Medical Center does not have to be a member of the employee practice plans to be considered an employee under Miss. Code Ann. § 11-46-1(f) of the MTCA. *Barksdale v. Carroll*, 2006 Miss. App. LEXIS 177 (Miss. Ct. App. Mar. 14, 2006), sub. op., op. withdrawn, 944 So. 2d 107, 2006 Miss. App. LEXIS 638 (Miss. Ct. App. 2006).

In a car accident case, where decedent's husband was suing a doctor who was an employee of the University of Mississippi Medical Center (UMMC), and the State, for purposes of liability under Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), the doctor was immune from liability because (1) he was acting as a supervisor with regard to the decedent; (2) he did not choose his patients or the residents that he supervised; (3) he was acting as a faculty physician and was following the direction of the UMMC; (4) over the phone, he acted in a supervisory capacity to a surgical resident, which involved little judgment or discretion; and (5) he was acting as an uncompensated faculty member for the UMMC, not as an independent contractor. Therefore, the doctor's motion for summary judgment on the husband's second amended complaint alleging causes of action for malpractice, negligence and medical negligence, *res ipsa loquitur*, and failure to obtain informed consent, was properly granted. *Barksdale v. Carroll*, 2006 Miss. App. LEXIS 177 (Miss. Ct. App. Mar. 14, 2006), sub. op., op. withdrawn, 944 So. 2d 107, 2006 Miss. App. LEXIS 638 (Miss. Ct. App. 2006).

Doctor was not immune under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), from a patient's malpractice suit because the doctor was an independent contractor, rather than an employee of a county hospital, within the meaning of "employee" in Miss. Code Ann. § 11-46-1(f), where the doctor's contract was with a private corporation that assigned her to work at the hospital and issued her paycheck. *Carpenter v. Reinhard*, 2005 U.S. Dist. LEXIS 37207 (N.D. Miss. July 15, 2005).

Grant of summary judgment against the patient in her medical malpractice action against the physician was proper where the physician was an employee of the state university medical center and therefore an employee of the state of Mississippi. Thus, he was immune from liability under Miss. Code Ann. § 11-46-7(2) of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Owens v. Thomae*, 904 So. 2d 207, 2005 Miss. App. LEXIS 401 (Miss. Ct. App. 2005).

In a medical malpractice action, a doctor was not entitled to summary judgment on the issue of immunity under the Mississippi Tort Claims Act because there were disputed issues of fact regarding the doctor's true employment status, including the nature of the doctor's contractual and business relationships with a county hospital and a private corporation. *Carpenter v. Reinhard*, 345 F. Supp. 2d 629, 2004 U.S. Dist. LEXIS 26581 (N.D. Miss. 2004).

Although a man, who fell under the definition of "employee" for purposes of Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, caused an accident that injured an individual and then failed to disclose to the individual that the man was a county employee, the individual failed to establish that the county withheld information regarding the employee's work status, nor did the individual show that the county provided the individual with misleading or inaccurate information, and the individual did not exercise due diligence in determining the true parties of the lawsuit or in determining the man's work status; thus, the court affirmed the trial court's grant of summary judgment under Miss. R. Civ. P. 56(c) in favor of the county and the man on the grounds that the individual failed to substantially comply with the notice requirements of the MTCA, and, therefore, the statute of limitations had expired. *Ray v. Keith*, 859 So. 2d 995, 2003 Miss. LEXIS 409 (Miss. 2003).

For purposes of Miss. Code Ann. § 11-46-1(f) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, receiving income for a University of Mississippi Medical Center medical practice plan does not make a physician an independent contractor. *Watts v. Tsang*, 828 So. 2d 785, 2002 Miss. LEXIS 304 (Miss. 2002).

For purposes of Miss. Code Ann. § 11-46-1(f) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, the doctor who supervised a procedure that left the patient a paraplegic was a state employee and immune from liability because (1) the doctor was employed by the University of Missis-

ssippi Medical Center (UMMC) and acting according to the terms and conditions of the doctor's contract; (2) the doctor was a full-time faculty member at UMMC and had never engaged in the practice of medicine outside the course and scope of the doctor's employment; and (3) the doctor was a supervising teacher and trainer of residents (interns and fellows as well) and did not receive compensation from any person or entity other than a State entity. *Watts v. Tsang*, 828 So. 2d 785, 2002 Miss. LEXIS 304 (Miss. 2002).

Summary judgment for the defendant physician was not appropriate in a medical malpractice action where the plaintiffs did not dispute that the physician was an employee of a state university in his role as an assistant professor, but there was a material issue of fact as to whether he was an employee of the state university in connection with his private practice. *Smith v. Braden*, 765 So. 2d 546, 2000 Miss. LEXIS 201 (Miss. 2000).

The defendant physician was not entitled to summary judgment in a medical malpractice action on the basis of the one year statute of limitations contained in the Tort Claims Act. There was a triable issue of fact regarding whether he was a state employee within the meaning of the statute while engaged in clinical outpatient practice under the general auspices of the state university which employed him. *Miller v. Meeks*, 762 So. 2d 302, 2000 Miss. LEXIS 169 (Miss. 2000).

The evidence showed that a doctor was not a staff physician, but rather a post-graduate house staff officer, and thus she was an employee of the state, who was provided with no additional compensation for her services; thus, the Tort Claims Act applied to her, and the lower court was correct in dismissing a medical malpractice action against her; however, the evidence with regard to two other doctors was not clear, and the cases against them were remanded for additional discovery. *Pickens v. Donaldson*, 748 So. 2d 684, 1999 Miss. LEXIS 292 (Miss. 1999).

5. Political subdivision.

In a pedestrian's action to recover for injuries she sustained after she stepped into a sunken utility box, a utilities com-

mission was properly granted summary judgment because the pedestrian released it when she executed a settlement agreement with the city; the pedestrian sent notice to both the city and the commission under the Mississippi Tort Claims Act, claiming the city was liable for the negligence of its employees by not making sure the sidewalk and utility box were installed properly. *Hathorn v. Louisville Utils. Comm'n*, 233 So. 3d 273, 2017 Miss. LEXIS 403 (Miss. 2017).

When a developer sued a city, the city's public utilities commission, and a utilities department (department) for damage to the developer's property in installing utility lines, the department was a "political subdivision" because (1) the department was an arm of the public utilities commission, (2) the department was responsible for governmental activities, and (3) whether the department was engaged in proprietary activities was irrelevant. *Kelley v. Corinth PUC*, 200 So. 3d 1107, 2016 Miss. App. LEXIS 36 (Miss. Ct. App.), cert. denied, — So. 3d —, 2016 Miss. LEXIS 393 (Miss. 2016), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 394 (Miss. 2016), cert. denied, 203 So. 3d 599, 2016 Miss. LEXIS 403 (Miss. 2016).

School district constitutes a governmental entity and a political subdivision pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Swindle v. Neshoba County Sch. Dist.*, 137 So. 3d 869, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 235 (Miss. 2014).

Definition of "governmental entity" included political subdivisions, and a county was a political subdivision. *Alexander v. Newton County*, 124 So. 3d 688, 2013 Miss. App. LEXIS 197 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 565 (Miss. 2013).

Volunteer firefighter was not immune from suit under the Mississippi Tort Claims Act (MTCA) for claims arising from an automobile accident because the volunteer fire department was not a political subdivision of the State. Under Miss. Code Ann. § 95-9-1(3)(b), the firefighter could be liable for negligent operation of a vehicle. *Poppenheimer v. Estate of Coyle*, 98 So. 3d 1059, 2012 Miss. LEXIS 486 (Miss. 2012).

Trial court erred by denying the community hospital's motion for summary judgment because: (1) the community hospital was a political subdivision of the State under Miss. Code Ann. § 11-46-1(i), and therefore the son was subject to the notice requirements and statutes of limitations of Miss. Code Ann. § 11-46-11(1); (2) under § 11-46-11(1), proper service of notice to the hospital would be on the CEO of the hospital, and not the county; (3) the trial court erred by concluding that substantial compliance with § 11-46-11(1) in regard to whom the notice was sent was erroneous; and (4) because the son never filed the statutorily required notice with the hospital's CEO, the hospital's sovereign immunity from suit was intact. *Tallahatchie Gen. Hosp. v. Howe*, 49 So. 3d 86, 2010 Miss. LEXIS 645 (Miss. 2010).

Husband and wife's 42 U.S.C.S. § 1983 suit against a Mississippi county sheriff's department failed because the department when viewed in accordance with Fed. R. Civ. P. 17(b)(3) and the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was not a separate legal entity that could be sued. *Winn v. Harrison County*, 2009 U.S. Dist. LEXIS 35323 (S.D. Miss. Apr. 27, 2009).

Where the deceased patient's daughter brought a medical malpractice suit against the University of Mississippi Medical Center, the Supreme Court of Mississippi held that the medical center was an instrument of the State and subject to the requirements of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1(j). Therefore, plaintiff was required to timely give notice of her claim to the medical center within one year as provided by Miss. Code Ann. § 11-46-11(3). *Univ. of Miss. Med. Ctr. v. McGee*, 999 So. 2d 837, 2008 Miss. LEXIS 597 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, the trial court determined that he was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-5. The doctor was an employee of a "community hospital" within the definition of "political subdivision" pursuant to Miss. Code Ann. § 11-46-1(i). *Estate of Grimes v. War-*

ington, 982 So. 2d 365, 2008 Miss. LEXIS 101 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, he did nothing to assert immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., for five years until he moved for summary judgment; because he delayed and actively participated in discovery, he waived MTCA immunity. *Estate of Grimes v. Warrington*, 982 So. 2d 365, 2008 Miss. LEXIS 101 (Miss. 2008).

While plaintiffs erred under Miss. Code Ann. § 11-46-1(i) in naming a sheriff's department as a defendant in a personal injury suit, the trial court erred in denying plaintiffs' motion for leave to amend the complaint pursuant to Miss. R. Civ. P. 15(c) to add a county as a defendant where plaintiffs' notice of claim letter put the proper county official on notice that, except for the mistake of naming the wrong party, the action would have been brought against the county. *Mieger v. Pearl River County*, 986 So. 2d 1025, 2008 Miss. App. LEXIS 21 (Miss. Ct. App.), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 371 (Miss. 2008).

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to res judicata; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 2006 U.S. App. LEXIS 21259 (5th Cir. Miss. 2006).

State legislature did not intend for the Mississippi Tort Claims Act (MTCA) to extend to a private entity such as defen-

dant, a transit company that executed an agreement with a city to operate and maintain a public transportation system; defendant was not created for the sole purpose of fulfilling a state mandated government service (rather, defendant was presumably created to be a profitable business for the benefit of its shareholders). *Thompson v. McDonald Transit Assocs.*, 440 F. Supp. 2d 530, 2006 U.S. Dist. LEXIS 50919 (S.D. Miss. 2006).

Although Miss. Code Ann. § 19-25-19 states that all sheriffs shall be liable for the acts of their deputies, this does not provide sufficient weight to tip the argument in favor of finding that a sheriff's department is a separate political subdivision or governmental entity for purposes of the Mississippi Tort Claims Act (MTCA). *Brown v. Thompson*, 927 So. 2d 733, 2006 Miss. LEXIS 100 (Miss. 2006).

In a case of first impression, the Supreme Court of Mississippi held that a county sheriff's department was not a political subdivision as defined in Miss. Code Ann. § 11-46-1(i), of the Mississippi Tort Claims Act (MTCA), and thus an individual's suit naming the sheriff's department was not properly filed; the county should have been named as the governmental defendant. A review of the structural relationship between counties and sheriff's departments in Miss. Code Ann. § 19-25-13 and Miss. Code Ann. § 19-25-19 supported that holding. *Brown v. Thompson*, 927 So. 2d 733, 2006 Miss. LEXIS 100 (Miss. 2006).

Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and sheriff realized there was no longer probable cause to hold the couple, sovereign immunity applied in the couple's suit against the sheriff and the county for false arrest and malicious prosecution, under the exception of Miss. Code Ann. § 11-46-9(1)(c). *Keen v. Simpson County*, 904 So. 2d 1157, 2004 Miss. App. LEXIS 1039 (Miss. Ct. App. 2004).

Trial court abused its discretion in denying a motion by a hospital and three

physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003).

Working in conjunction with Miss. Code Ann. § 11-46-3(1), § 11-46-1(i) defines "political subdivisions" to specifically include school districts. *Harris v. McCray*, 867 So. 2d 188, 2003 Miss. LEXIS 553 (Miss. 2003).

Airport authority that argued it was a "joint airport board" was nevertheless a governmental entity that exercised powers that were declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity, and thus was a political subdivision under subsection (i); the airport authority could not escape liability by merely asserting that it was really an airport board because airport boards, although not specifically listed, were by definition subject to the statute. *Spencer v. Greenwood/Leflore Airport Auth.*, 834 So. 2d 707, 2003 Miss. LEXIS 5 (Miss. 2003).

For purposes of Miss. Code Ann. § 11-46-1(i), (j) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, the University Anesthesia Services is an instrumentality of the State, even though it is a private, for-profit corporation that pays state taxes like other private corporations. *Watts v. Tsang*, 828 So. 2d 785, 2002 Miss. LEXIS 304 (Miss. 2002).

For purposes of Miss. Code Ann. § 11-46-1(i), (j) of the the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 through 11-46-23, where a medical practice group was created by the University of Mississippi Medical Center (UMMC), and is overseen by UMMC, and the purpose is to supplement the income of its faculty; when the day-to-day oversight is left to the department chair, subject to limited oversight by the vice chan-

cellor, and its membership is composed solely of full-time UMMC-faculty physicians; where the faculty physicians can only practice at UMMC-approved sites, and the money is distributed on a point system based on factors other than mere patient service, the medical practice group is a State entity. *Watts v. Tsang*, 828 So. 2d 785, 2002 Miss. LEXIS 304 (Miss. 2002).

School district was entitled to sovereign immunity from wrongful death action arising out of death of eight-year-old special education student who ran away from school. *Brown v. Houston Sch. Dist.*, 704 So. 2d 1325, 1997 Miss. LEXIS 745 (Miss. 1997).

6. Dismissal of claim.

Grant of summary judgment in favor of the university, Board, and others was proper because the professor failed to wait for a final decision by the Board regarding approval of her application for tenure prior to filing suit; her claims based on tortious conduct, tortious breach of contract, and breach of an implied contractual term or warranty were foreclosed by her failure to adhere to the requirement of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., that all administrative remedies be exhausted prior to filing suit. *Whiting v. Univ. of S. Miss.*, 62 So. 3d 907, 2011 Miss. LEXIS 170 (Miss. 2011), overruled in part, *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

State court negligence claim under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 through 11-46-23 (Rev. 2002), was properly dismissed on the ground of res judicata because administratrix's prior federal 42 U.S.C.S. § 1983 suit was derived from the same underlying facts and circumstances, and the four elements of the doctrine of res judicata were met. *Hill v. Carroll County*, 17 So. 3d 1081, 2009 Miss. LEXIS 443 (Miss. 2009).

Civil rights litigant's motion to amend his pro se complaint in tort to add a federal claim under 42 U.S.C.S. § 1983 for violation of his right to free speech on the ground that the tort claims were barred by the Mississippi Tort Claims Act was properly denied because the federal

claim was barred under the applicable residual three-year statute of limitation period in Miss. Code Ann. § 15-1-49 and because the amended claim did not relate back to the time of the filing of the original pleading, pursuant to Miss. R. Civ. P. 15(c); the proposed amendment did not pass the identity of transaction test because the tort claims asserted in the original complaint did not bear a relation to the free speech claim and the defendant was not on notice regarding the free speech claim. *Giles v. Stokes*, 988 So. 2d 926, 2008 Miss. App. LEXIS 419 (Miss. Ct. App. 2008).

Where a county hospital and its employee were sued in tort for injuries related to a car accident that occurred when the employee was running an errand for her employer, the dismissal of the employee from the action under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., did not act as a release of her insurance company. The insurance company was contractually obligated to defend or indemnify the county hospital as an additional insured under the language of the insurance policy. *Franklin County Mem'l Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So. 2d 872, 2008 Miss. LEXIS 122 (Miss. 2008).

Grant of summary judgment in favor of the city and police officer in the jogger's action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, after he was struck by the police officer while jogging was appropriate because the jogger failed to prove that the officer acted with reckless disregard of the safety and well-being of others, Miss. Code Ann. § 11-46-9(1)(c). *Morton v. City of Shelby*, 984 So. 2d 323, 2007 Miss. App. LEXIS 761 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 274 (Miss. 2008).

Dismissal of the employee's action after he was terminated was proper because although he filed his suit against the sheriff's department and the sheriff within the statutorily prescribed period in Miss. Code Ann. § 11-46-11(3), he still failed to comply with the Mississippi Tort Claims Act since he filed his complaint 37 days before he filed his notice of claim with the sheriff's department. *Clanton v. DeSoto*

County Sheriff's Dep't, 963 So. 2d 560, 2007 Miss. App. LEXIS 30 (Miss. Ct. App. 2007).

In an action pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., where a slow-moving county motor grader executed a turn on the highway, even though the operator did not give a hand signal, the grader operator was not negligent in failing to do same or for failing to keep a proper lookout, but the injured driver was negligent in passing the grader within 100 feet of an intersection and failing to keep a proper lookout. *Barnett v. Lauderdale County Bd. of Supervisors*, 880 So. 2d 1085, 2004 Miss. App. LEXIS 853 (Miss. Ct. App. 2004).

Evidence showed the officer was traveling approximately 37 miles per hour with lights and sirens activated, there was nothing obstructing the view of either the person later injured or the officer, and the greater weight of evidence also proved that the person's left turn signal was not activated. In addition, the officer had consciously stopped at the previous two intersections because the officer considered both of those to be blind intersections, and therefore, the officer's behavior supported the finding that the officer appreciated the risk involved in approaching the intersection and did not act with reckless disregard. *Davis v. Latch*, 873 So. 2d 1059, 2004 Miss. App. LEXIS 445 (Miss. Ct. App. 2004).

Grant of summary judgment in favor of the employee's employer was proper where the employee failed to substantially comply with the notice provisions of the Mississippi Tort Claim Act's, Miss. Code Ann. § 11-46-1 et seq., Miss. Code Ann. § 11-46-11. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 2004 Miss. LEXIS 492 (Miss. 2004).

When a victim was raped by a parolee accepted from another state for supervision, summary judgment was correctly granted to the State in the victim's action against it for negligently accepting supervision of the parolee and negligently supervising him because acceptance of the parolee's supervision was mandatory under the Uniform Act for Out-of-State Parolee Supervision, Miss. Code Ann. § 47-7-71, as he had family and a job in

Mississippi, and decisions made by the parolee's supervising parole officer in the course of the parolee's supervision were discretionary, so the State could not be held liable under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

Former university professor's tortious interference with contract claim against the university that formerly employed her and its officials was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann. § 11-46-11(3) as it was not timely filed. *Black v. Ansah*, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), op. withdrawn, sub. op., 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

In an arrestee's suit alleging that a deputy sheriff used excessive force, the arrestee's state-law tort claims were dismissed because the arrestee failed, under the substantial compliance standard, to comply with the notice provisions of the Mississippi Tort Claims Act. *Whiting v. Tunica County*, 222 F. Supp. 2d 809, 2002 U.S. Dist. LEXIS 16741 (N.D. Miss. 2002).

7. Expert testimony.

In a case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., a trial court did not err by allowing expert testimony under Miss. R. Evid. 702 because a witness did not have to be a pulmonologist in order to opine on matters concerning aspiration pneumonia; the witness had received specialized training and knowledge in medical school and by treating other patients. *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141, 2007 Miss. LEXIS 691 (Miss. 2007).

8. Standard of care.

In a medical negligence suit brought by the decedent's brother under the Mississippi Tort Claims Act, the circuit court did not err in finding in favor of appellees, the

intermediate-care facility and the Mississippi Department of Mental Health, as no breach of the standard of care proximately caused the decedent's death because appellees' expert witness testified that the decedent was an independent patient who, within reason, could move about her residence at the facility without an escort; and, although the facility's staff was required to know the decedent's location at all times and to perform 15-minute checks on her, the term "monitored closely" did not equate to constant one-on-one supervision of the decedent. *Harper v. Huds-peth Reg'l Ctr.*, 270 So. 3d 239, 2018 Miss. App. LEXIS 392 (Miss. Ct. App. 2018).

Where alleged negligent actions are caused by an employee who is not a doctor or a nurse in a medical malpractice case, the conduct must be evaluated using traditional negligence/reasonable care standards; therefore, in a case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., the reasonable care standard was properly applied where an employee's action caused water to be aspirated by a post-surgical patient, which allegedly resulted in pneumonia. This action contradicted the medical records, which stated that the patient was to receive nothing by mouth. *Univ. of Miss. Med. Ctr. v. Pounders*, 970 So. 2d 141, 2007 Miss. LEXIS 691 (Miss. 2007).

9. Miscellaneous.

Trial court erred in dismissing a son's wrongful death action against a state hospital because its director was the hospital's CEO under the Mississippi Tort Claims Act, and the son provided pre-suit notice to the proper party; the definition of "State" in the MTCA included hospitals, and the Department of Mental Health was not a substitute for the CEO of the hospital, which was the "state entity." *Ivy v. E. Miss. State Hosp.*, 191 So. 3d 120, 2016 Miss. LEXIS 188 (Miss. 2016).

In a personal injury suit brought against a deputy sheriff and the county that employed him, the trial court did not err in finding that immunity under the Mississippi Tort Claims Act did not attach to the county because the deputy acted in reckless disregard for the safety of others by continuing to drive a vehicle that had

been signaling that there were brake problems for several weeks and failing to properly resolve the brake issues. The deputy, being aware that the brake-warning light was still on in the vehicle during the weeks leading up to the accident, should not have continued driving the vehicle in a professional capacity. *Pearl River Cnty. v. Bethea*, 196 So. 3d 1012, 2015 Miss. App. LEXIS 627 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 616, 2016 Miss. LEXIS 307 (Miss. 2016).

Personal-injury action did not need to be remanded for a determination of the mother's competency under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because the son did not request a determination of unsoundness of mind from the trial court and issues not raised in the trial court were barred from consideration at the appellate level. Further, because the son brought the action on behalf of his mother and she was not the plaintiff in the case, her competence to assert her rights in the lawsuit was not at issue. *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941, 2011 Miss. LEXIS 281 (Miss. 2011).

There was no showing of inequitable conduct on behalf of either defendant in a personal injury action since no action by either reasonably could have induced the mother's son to believe that defendants were not entitled to the privileges and immunities of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. Thus, the trial court erred by finding that the doctrine of equitable estoppel prevented defendants from asserting the MTCA statute of limitations. *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941, 2011 Miss. LEXIS 281 (Miss. 2011).

Driver and center did not waive their defenses under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Although there was an approximately 11-month delay in the case, during the delay no party took any action to advance the litigation and during the delay, the center and driver pursued their affirmative defenses by informing the mother's son of their intent to seek a hearing on the motion to dismiss, Miss. Code Ann. § 11-46-11(3). *Kimball Glassco Residential Ctr.*

v. Shanks, 64 So. 3d 941, 2011 Miss. LEXIS 281 (Miss. 2011).

Trial court did not apply an incorrect standard of care for comparative negligence when it failed to require an employee to show that a county sheriff's deputy acted with reckless disregard because the deputy was not afforded the protection provided by Miss. Code Ann. § 11-46-9(1)(c) when his personal injury suit against the employer, a non-governmental entity, was not a claim as defined under Miss. Code Ann. § 11-46-1(a); section 11-46-9(1)(c) limits liability, not fault, when a plaintiff files suit against a governmental entity, and there was no reason why it should prohibit the allocation of fault when an employee of the governmental entity files suit against a non-governmental entity. *Thompson v. Rizzo Farms, Inc.*, 27 So. 3d 452, 2009 Miss. App. LEXIS 568 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 67 (Miss. 2010).

Pursuant to 28 U.S.C.S. § 1367(c)(3), a

court declined to exercise supplemental jurisdiction over the Mississippi Tort Claims Act (MTCA) claims of an arrestee and her children after their federal 42 U.S.C.S. § 1983 claims were dismissed with prejudice, as the Mississippi Supreme Court expressed a strong preference that MTCA claims be litigated before a state circuit judge. *Smith v. City of Nettleton*, 2008 U.S. Dist. LEXIS 101175 (N.D. Miss. Dec. 15, 2008).

After dismissing, upon summary judgment, a former student's 42 U.S.C.S. § 1983 claims against a university and its officials, a court declined, pursuant to 28 U.S.C.S. § 1367(c)(3), to exercise supplemental jurisdiction over the student's Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., and state law breach of contract claims. *Senu-Oke v. Jackson State Univ.*, 521 F. Supp. 2d 551, 2007 U.S. Dist. LEXIS 76367 (S.D. Miss. 2007), aff'd, 283 Fed. Appx. 236, 2008 U.S. App. LEXIS 13264 (5th Cir. Miss. 2008).

OPINIONS OF THE ATTORNEY GENERAL

Drainage district is political subdivisions of state, as well as private enterprise, and should have liability insurance coverage. *Bradley* Sept. 8, 1993, A.G. Op. #93-0632.

Office of district attorney is not exempt from supporting Tort Claims System through requirements to have liability insurance by virtue of general immunity. *Mellen*, Jan. 12, 1994, A.G. Op. #93-0705.

Although counties and cities are without authority to provide specific types of insurance set forth in Section 25-15-101 to volunteer firefighters, tort risk coverage may be provided under Section 11-46-1. *Ranck*, Feb. 16, 1994, A.G. Op. #94-0080.

Sections 11-46-1 et seq. include actions brought against state agency employees and political subdivision employees in federal law actions for acts or omissions occurring within the course and scope of their duties. *Hardy*, March 2, 1995, A.G. Op. #95-0084.

The Mississippi Business Finance Corporation (MBFC), as a state agency, has sovereign immunity. MBFC does not have the authority to execute an agreement

which would, in effect, waive the immunity by agreeing to indemnify a third party for claims. *Pittman*, March 29, 1995, A.G. Op. #95-0107.

The Workers' Compensation Commission peer reviewers fall within the definition of Section 11-46-1(f) and as such would be entitled to a defense subject to all provisions of the Act. Additionally, if Section 11-46-9(1)(d) applies, the Commission's peer reviewers would be exempt from liability and therefore immune from suit. *Porter*, August 23, 1995, A.G. Op. #95-0343.

The definition, in Section 11-46-1(f), does exclude from the protection of the Act those persons "acting on behalf of the state" who are "independent contractors." *Howell*, March 8, 1996, A.G. Op. #96-0137.

The Tort Claims Act is not a "law with respect to the acquisition, operation or disposition of property," and therefore a housing authority is not excluded from the requirements of the Tort Claims Act. See Sections 11-46-1(i), 43-33-5 and 43-33-11. *Hardy*, March 29, 1996, A.G. Op. #96-0157.

There appears to be no statutory prohibition to using wanted posters in an effort to find individuals with outstanding contempt of court warrants. However, the Mississippi Tort Claims Act as set forth in Section 11-46-1 et. seq., does not protect state agencies or political subdivisions from defamation. Moran, July 8, 1996, A.G. Op. #96-0431.

If the county does not choose to provide a bond for the medical examiner, and the medical examiner is sued in her official capacity, the county would be obligated to provide legal counsel. See Sections 25-1-47 and 11-46-1, et seq. Brooks, December 20, 1996, A.G. Op. #96-0835.

Staff physicians under contract with the University of Mississippi Medical Center are employees of a governmental entity of the State of Mississippi, and the Medical Center is responsible for affording them a defense and paying any judgment against them or settlement for any claim arising out of an act or omission within the course and scope of their employment, and within the limits of the Mississippi Tort Claims Act. Conerly, September 4, 1998, A.G. Op. #98-0500.

A county supervisor falls within the definition of "employee" under the Mississippi Tort Claims Act. Ross, Jr., Jan. 22, 2002, A.G. Op. #01-0754.

An unpaid volunteer acting on behalf of a state university hospital is afforded coverage under the Tort Claims Act. Conerly, Mar. 29, 2002, A.G. Op. #02-0144.

Full-time staff doctors employed by and paid by a public hospital owned by a county are considered employees for purposes of the Tort Claims Act, and as such, are not personally liable for acts or omissions occurring within the course and scope of their employment. Brown, Apr. 26, 2002, A.G. Op. #02-0211.

The Bolivar Medical Center Foundation is a public corporation and the respective trustees and employees are covered by the Tort Claims Act. Griffith, Oct. 18, 2002, A.G. Op. #02-0590.

Employees of the Pat Harrison Waterway District acting within the scope and course of their employment are covered by the Tort Claims Act. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

Doctors, nurses and pharmacists employed by the State Department of Health

and acting within the scope and course of their employment are covered by the Tort Claims Act. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

A legal defense is provided to doctors, nurses and pharmacists employed by the State Department of Health even though the conduct is alleged to be outside the course and scope of their employment. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

There is no reason for a practitioner to obtain additional liability coverage as long as the acts are within the course and scope of his employment with the State Health Department. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

Physicians, while performing responsibilities as Emergency Medical Services Medical Directors, are acting on behalf of the state in an official capacity and would fall within the definition of "employee" under the Mississippi Tort Claims Act. Amy, Aug. 8, 2005, A.G. Op. #05-0366.

No authority can be found for a state agency to enter into a contract which includes language obligating the state to defend a vendor or contractor, when the state or its employees are negligent. The state may affirmatively acknowledge its potential liability for negligence under the Tort Claims Act. Stringer, Jan. 25, 2006, A.G. Op. #06-0610.

In an instance where a Mississippi Animal Response Team volunteer is injured in a training exercise sponsored by the Mississippi Board of Animal Health, or where the volunteer injures a third party at such training event, any liability claims arising out of actions of the volunteer are subject to the Mississippi Tort Claims Act. Watson, Feb. 3, 2006, A.G. Op. #06-0005.

A county may enter private land and remove tree stumps and debris as part of a settlement with the landowner. Clanton, Feb. 10, 2006, A.G. Op. #06-0023.

Where a Mississippi Animal Response Team volunteer is injured in a training exercise sponsored by the Mississippi Board of Animal Health, or where the volunteer injures a third party at such training event, any liability claims arising out of actions of the volunteer are subject to the Mississippi Tort Claims Act. Watson, Feb. 24, 2006, A.G. Op. #06-0050.

Although a community hospital is a political subdivision protected by the Mis-

Mississippi Tort Claims Act, any non-profit corporation or limited liability company formed by the hospital is not. *Williamson*, Apr. 7, 2006, A.G. Op. #06-0040.

There is no authority that would allow a city to reimburse city employees for the cost incurred for damage that was caused to their personal property while it was housed or displayed on city property. *Lawrence*, June 26, 2006, A.G. Op. #06-0237.

A community hospital is a political subdivision protected by the Mississippi Tort Claims Act. *Donnell*, July 22, 2005, A.G. Op. #05-0304.

A county may accept the donation of

services and materials from a private developer for public construction projects performed on public land, including county roads. The county board of supervisors should make the appropriate findings of fact citing the need for the work and characterizing the work as a donation, and record the findings in the minutes. The board of supervisors should also assess any potential liability concerns with the county's insurance carrier regarding the implications under the Tort Claims Act. *Bond*, February 23, 2007, A.G. Op. #07-00048.

RESEARCH REFERENCES

ALR.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary function. 16 A.L.R.2d 1079.

Persons upon whom notice of injury or claim against municipal corporation may or must be served. 23 A.L.R.2d 969.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 A.L.R.2d 203.

Tort liability of governmental unit for injury or damage resulting from insecticide and vermin eradication operations. 25 A.L.R.2d 1057.

Operation of garage for maintenance and repair of municipal vehicles as governmental function. 26 A.L.R.2d 944.

Installation or operation of parking meters as within governmental immunity from tort liability. 33 A.L.R.2d 761.

Infancy or incapacity as affecting notice required as condition of holding municipality or other political subdivision liable for personal injury. 34 A.L.R.2d 725.

Tort liability of municipality or other governmental unit in connection with destruction of weeds and the like. 34 A.L.R.2d 1210.

Maintenance of auditorium, community recreational center, building, or the like, by municipal corporation as governmental or proprietary function for purposes of tort liability. 47 A.L.R.2d 544.

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etary function, for purposes of tort liability. 55 A.L.R.2d 1434.

Rule of municipal immunity from liability for acts in performance of governmental functions as applicable to personal injury or death as result of a nuisance. 56 A.L.R.2d 1415.

Municipal operation of sewage disposal plant as governmental or proprietary function, for purposes of tort liability. 57 A.L.R.2d 1336.

Municipal immunity from liability for torts. 60 A.L.R.2d 1198.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body. 65 A.L.R.2d 1278.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 A.L.R.2d 1437.

What is "motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicles. 77 A.L.R.2d 945.

Liability for performing an autopsy. 83 A.L.R.2d 955.

Snow removal operations as within doctrine of governmental immunity from tort liability. 92 A.L.R.2d 796.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability. 9 A.L.R.3d 382.

Modern status of the rules as to immunity of foreign sovereign from suit in federal or state courts. 25 A.L.R.3d 322.

Modern status of doctrine of sovereign immunity as applied to public schools and

institutions of higher learning. 33 A.L.R.3d 703.

Liability of highway authorities arising out of motor vehicle accident allegedly caused by failure to erect or properly maintain traffic control device at intersection. 34 A.L.R.3d 1008.

Tort liability of public schools and institutions of higher learning for injuries caused by acts of fellow students. 36 A.L.R.3d 330.

Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes. 37 A.L.R.3d 712.

Tort liability of public schools and institutions of higher learning for injuries due to condition of grounds, walks, and playgrounds. 37 A.L.R.3d 738.

Tort liability of public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision. 38 A.L.R.3d 830.

Liability of municipal corporation for negligent performance of building inspector's duties. 41 A.L.R.3d 567.

Liability of governmental entity or public officer for personal injury or damages arising out of vehicular accident due to negligent or defective design of highway. 45 A.L.R.3d 875.

Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit. 55 A.L.R.3d 930.

Modern status of the law as to validity of statutes or ordinances requiring notice of tort claim against local governmental entity. 59 A.L.R.3d 93.

Liability of governmental entity for issuance of permit for construction which caused or accelerated flooding. 62 A.L.R.3d 514.

Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties. 71 A.L.R.3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties. 71 A.L.R.3d 90.

Maintenance of class action against governmental entity as affected by requirement of notice of claim. 76 A.L.R.3d 1244.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state. 81 A.L.R.3d 1239.

Governmental tort liability for social service agency's negligence in placement, or supervision after placement, of children. 90 A.L.R.3d 1214.

Governmental liability from operation of zoo. 92 A.L.R.3d 832.

Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damage sustained when motorist strikes tree or stump on abutting land. 100 A.L.R.3d 510.

Liability of university, college, or other school for failure to protect student from crime. 1 A.L.R.4th 1099.

Tort liability of public schools and institutions of higher learning for educational malpractice. 1 A.L.R.4th 1139.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge. 2 A.L.R.4th 635.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury – modern status. 7 A.L.R.4th 1063.

Liability of urban redevelopment authority or other state or municipal agency or entity for injuries occurring in vacant or abandoned property owned by governmental entity. 7 A.L.R.4th 1129.

Construction and application, under state law, of doctrine of "executive privilege". 10 A.L.R.4th 355.

Liability of state, in issuing automobile certificate of title, for failure to discover title defect. 28 A.L.R.4th 184.

Governmental tort liability as to highway median barriers. 58 A.L.R.4th 559.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects. 58 A.L.R.4th 1197.

Governmental liability for failure to post highway deer crossing warning signs. 59 A.L.R.4th 1217.

State's liability for personal injuries from criminal attack in state park. 59 A.L.R.4th 1236.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody. 60 A.L.R.4th 942.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 A.L.R.5th 1.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries. 48 A.L.R.5th 129.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 A.L.R.5th 301.

Liability of municipality or other governmental unit for failure to provide police protection from crime. 90 A.L.R.5th 273.

Action in Replevin for Recovery of Dog or Cat. 85 A.L.R.6th 429.

Federal Tort Claims Act: When is government officer or employee "acting within the scope of his office or employment" for purpose of determining government liability under 28 USCS sec. 1346(b). 6 A.L.R. Fed. 373.

Effect of Foreign Sovereign Immunities Act (28 USCS secs. 1330, 1441(d), 1602 et seq.) on right to jury trial in action against foreign state. 56 A.L.R. Fed. 679.

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Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions, 76 Miss. L.J. 973, Spring, 2007.

§ 11-46-3. Declaration of legislative intent.

(1) The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract, including but not limited to libel, slander or defamation, by the state or its political subdivisions, or any such act, omission or breach by any employee of the state or its political subdivisions, notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature and notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefor.

(2) The immunity of the state and its political subdivisions recognized and reenacted herein is and always has been the law in this state, before and after November 10, 1982, and before and after July 1, 1984, and is and has been in full force and effect in this state except only in the case of rights which, prior to the date of final passage hereof, have become vested by final judgment of a court of competent jurisdiction or by the express terms of any written contract or other instrument in writing.

HISTORY: Laws, 1984, ch. 495, § 2; reenacted and amended, Laws, 1985, ch. 474, § 2; reenacted and amended, Laws, 1986, ch. 438, § 1; Laws, 1987, ch. 483, § 1; Laws, 1988, ch. 442, § 1; Laws, 1989, ch. 537, § 1; Laws, 1990, ch. 518, § 1; Laws, 1991, ch. 618, § 1; Laws, 1992, ch. 491 § 3; Laws, 1992 Special Session, ch. 3, § 1; Laws, 1993, ch. 476, § 2, eff from and after passage (approved April 1, 1993).

Editor's Notes — Laws of 1987, ch. 483, § 50, provides as follows:

"SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

Cross References — Waiver of immunity granted in this section, see § 11-46-5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Retroactivity.
3. Implied contracts.
4. Illustrative cases.

1. In general.

Holding that Mississippi Tort Claims Act covers both tortious breach of contract and breaches of implied terms and warranties of a contract, extends to claims for tortious interference with business relations as well. *Idom v. Natchez-Adams Sch. Dist.*, 115 F. Supp. 3d 792, 2015 U.S. Dist. LEXIS 91321 (S.D. Miss. 2015).

Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., serves to provide immunity from suit to the State of Mississippi and its political subdivisions; however, the MTCA waives immunity for claims for money damages arising out of the torts of government entities and employees while acting within the course and scope of their employment to the extent set forth in the MTCA. *Swindle v. Neshoba County Sch. Dist.*, 137 So. 3d 869, 2013 Miss. App. LEXIS 574 (Miss. Ct.

App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 235 (Miss. 2014).

A thorough review of Miss. Code Ann. § 1-3-33 and the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., revealed that there was no contrary intent manifested by the Legislature that meant that the MTCA should be interpreted only in the singular manner; Miss. Code Ann. § 11-46-15(1) was interpreted by using singular or plural language. The Legislature did not manifestly express a contrary intention not to include plural language in its Declaration of Legislative Intent set forth in Miss. Code Ann. § 11-46-3. *Miss. DOT v. Allred*, 928 So. 2d 152, 2006 Miss. LEXIS 114 (Miss. 2006).

Resident's argument that the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-3, should not apply to investment property was untenable as Miss. Code Ann. § 11-46-3 (1) explicitly mentioned immunity pertaining to proprietary functions; furthermore, under a political subdivision's broad power to purchase and hold real estate, the lesser power to lease was necessarily implied. *Davis v. Forrest Royale Apts.*, 938 So. 2d 293, 2006 Miss.

App. LEXIS 172 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 545 (Miss. 2006).

In conjunction with Miss. Code Ann. § 11-46-3(1), § 11-46-1(i) defines "political subdivisions" to specifically include school districts. *Harris v. McCray*, 867 So. 2d 188, 2003 Miss. LEXIS 553 (Miss. 2003).

The statute does not violate the separation of powers doctrine. *Fortune v. Lee County Bd. of Supervisors*, 725 So. 2d 747, 1998 Miss. LEXIS 321 (Miss. 1998).

Under subsection (2), only acts of an incorporated municipality which are proprietary in nature are excepted from sovereign immunity. *Mosby v. Moore*, 716 So. 2d 551, 1998 Miss. LEXIS 276 (Miss. 1998), limited, *Gale v. Thomas*, 759 So. 2d 1150, 1999 Miss. LEXIS 379 (Miss. 1999).

Department of Transportation had sovereign immunity from liability to motorist who was injured at intersection where department was conducting road construction when oncoming ambulance struck her car at intersection, allegedly after department's flagman flagged motorist to proceed with left turn; department's purchase of liability insurance for employees operating motor vehicles in performance of official duties did not waive immunity, as flagman was not operating motor vehicle. *Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597, 1997 Miss. LEXIS 421 (Miss. 1997).

Department of Transportation had sovereign immunity on claim for indemnification by ambulance service that was sued for injuries sustained by motorist when oncoming ambulance struck her car at intersection, allegedly after department's flagman flagged her to proceed with left turn. *Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597, 1997 Miss. LEXIS 421 (Miss. 1997).

Sovereign immunity applies to actions where state is possible joint tort-feasor. *Mississippi Transp. Comm'n v. Jenkins*, 699 So. 2d 597, 1997 Miss. LEXIS 421 (Miss. 1997).

School district was "political subdivision" of state and thus was protected by sovereign immunity from negligence suit arising from incident on August 26, 1993, after effective date of statute restoring

sovereign immunity for state and its political subdivisions, but before effective date of statute largely waiving such immunity for political subdivisions. *Gressett by & Through Gressett v. Newton Separate Mun. Sch. Dist.*, 697 So. 2d 444, 1997 Miss. LEXIS 326 (Miss. 1997).

Codification of principles of sovereign immunity did not violate Mississippi constitutional provision that courts shall be open and remedy shall be available for every injury; remedy clause is not absolute guarantee of trial and it is legislature's decision whether or not to address restrictions upon actions against government entities. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

Codification of principles of sovereign immunity did not violate due process clause of Fourteenth Amendment; there was no right to sue state or its political subdivisions at common law and, through codification, legislature continued to withhold such right, and thus there was no property right to sue state. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

Sovereign immunity cloaks all "governmental functions" a city performs. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

"Governmental functions," which are cloaked with sovereign immunity, are those functions which a city is required to undertake. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Operation of fire department, including the supply of water to combat fires, is a governmental function, cloaked by sovereign immunity, even if the same supply provides drinking water, which is proprietary activity. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

City could not lose sovereign immunity for fire protection service in annexed area through negligence per se, where annexation ordinance did not require specific placement of water lines or mains in a certain point. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Governmental officers are immune from personal liability for fire protection deci-

sions if the decision to provide water lines, or certain aspects of fire protection to property, is a discretionary matter involving public policy decisions. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Provision of water lines, under annexation ordinance providing for installment of water lines “when necessary and economically feasible,” was discretionary decision, for which city officials were entitled to qualified immunity. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

The decision of *Presley v. Mississippi State Highway Commission* (Miss. 1992) 608 So. 2d 1288, which declared the codified principle of sovereign immunity (§§ 11-46-1 et seq.) unconstitutional, has no retroactive application. *Robinson v. Stewart*, 655 So. 2d 866, 1995 Miss. LEXIS 223 (Miss. 1995).

There is no “property right” to sue the State, since the Mississippi Legislature has withheld that right through its statutes, and therefore the principle of sovereign immunity, as enacted by the legislature in §§ 11-46-1 et seq., does not violate the due process clause of the Mississippi Constitution or the 14th Amendment to the United States Constitution. *Robinson v. Stewart*, 655 So. 2d 866, 1995 Miss. LEXIS 223 (Miss. 1995).

The Mississippi Legislature’s post-Pruttett legislative enactments on sovereign immunity (§§ 11-46-1 et seq.) do not violate the remedy clause of the Mississippi Constitution. *Robinson v. Stewart*, 655 So. 2d 866, 1995 Miss. LEXIS 223 (Miss. 1995).

A city’s operation of a service garage and towing service for its vehicles was a proprietary function, and therefore the defense of sovereign immunity was not available in a wrongful death action against the city arising from a collision between the deceased’s car and a city tow truck. *Thomas v. Hilburn*, 654 So. 2d 898, 1995 Miss. LEXIS 230 (Miss. 1995).

For purposes of governmental immunity, the statutory framework for reporting cases of suspected child abuse includes elements of both ministerial and discretionary conduct; § 43-21-353 first requires a person to make a determination

of whether “reasonable cause” exists as a foundation for an incident report, which involves a duty to investigate a ministerial duty and a decision as to whether reasonable cause exists a decision involving the exercise of personal judgment and discretion; if a determination is made that there is reasonable cause to report the incident, the statute then mandates that an immediate oral report be issued to the Department of Human Services an action involving no discretion. *T.M. v. Noblitt*, 650 So. 2d 1340, 1995 Miss. LEXIS 15 (Miss. 1995).

The governor was not protected by § 11-46-3 in a declaratory action alleging that he engaged in rulemaking under state law and violated the plaintiff’s right to take part in the rulemaking process under the state’s Administrative Procedures Law because he failed to give notice of his plans to adopt a Capacity Assurance Plan before its submission to the United States Environmental Protection Agency, since the statute is part of the governmental immunity and tort claims act and the plaintiff’s claim was not based on tort damages under § 11-46-3(1). *Fordice v. Thomas*, 649 So. 2d 835, 1995 Miss. LEXIS 34 (Miss. 1995), but see *USPCI of Mississippi v. State ex rel. McGowan*, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

The governmental immunity and tort claims act should not be construed to immunize governmental authorities and agencies from suits other than for money damages. *Fordice v. Thomas*, 649 So. 2d 835, 1995 Miss. LEXIS 34 (Miss. 1995), but see *USPCI of Mississippi v. State ex rel. McGowan*, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

A county was protected by sovereign immunity in a wrongful death action arising from an automobile collision which occurred on a county road bridge on September 20, 1985, following the enactment of §§ 11-46-1 et seq. *Coplin v. Francis*, 631 So. 2d 752, 1994 Miss. LEXIS 40 (Miss. 1994), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

The decision of the Supreme Court declaring unconstitutional the portion of the Sovereign Immunity Act (§§ 11-41-6 et seq.) mandating that all claims against

the State be governed by case law governing sovereign immunity as it existed on November 10, 1982, applies prospectively only, and is "purely prospective" so that it applies only to claims arising after the mandate issues. *Presley v. Mississippi State Highway Com.*, 608 So. 2d 1288, 1992 Miss. LEXIS 581 (Miss. 1992).

To the extent that § 11-46-6 purports to freeze the doctrine of sovereign immunity to the state of development of the common law prior to *Pruett v. City of Rosedale* (Miss. 1982) 421 So. 2d 1046, it is void; the State is immunized from claims arising thereafter to the extent that the Supreme Court would do so applying the evolving standards of common law, including any extensions or contractions of the doctrine deemed appropriate, on a case by case basis and to the extent that those benefiting by the immunity did not prepare themselves by acquiring insurance policies covering the liability in question in the event that immunity did not obtain. *Presley v. Mississippi State Highway Com.*, 608 So. 2d 1288, 1992 Miss. LEXIS 581 (Miss. 1992).

The portion of the Sovereign Immunity Act (§§ 11-46-1 et seq.) requiring that all claims against the State be governed by case law governing sovereign immunity as it existed immediately prior to the decision in *Pruett v. City of Rosedale* (Miss. 1982) 421 So. 2d 1046 is unconstitutional as it violates the doctrine of separation of powers and the prohibition against reviving or amending a law by reference to its title only. *Presley v. Mississippi State Highway Com.*, 608 So. 2d 1288, 1992 Miss. LEXIS 581 (Miss. 1992).

In a personal injury action against a city and city officials, the 6-year statute of limitations set forth in § 15-1-49, rather than the 2-year statute of limitations set forth in § 11-46-11(3) of the Tort Claims Act, applied since the Tort Claims Act had not yet taken effect. *Starnes v. Vardaman*, 580 So. 2d 733, 1991 Miss. LEXIS 312 (Miss. 1991).

The continuance of electrical power is a property interest worthy of due process protections. Thus, the defense of sovereign immunity was not available to a county where a homeowner alleged that he had been damaged when the county

and an electrical utility discontinued his electrical power, since sovereign immunity is no defense where a violation of constitutional rights is concerned. *Tucker v. Hinds County*, 558 So. 2d 869, 1990 Miss. LEXIS 173 (Miss. 1990).

2. Retroactivity.

Where the plaintiff was not prejudiced by application of the retroactive provisions of this section, she had no standing to assert that the retroactive provisions of this section rendered this section constitutionally defective as a whole. *Lincoln County Sch. Dist. v. D.B.*, 749 So. 2d 943, 1999 Miss. LEXIS 164 (Miss. 1999).

3 Implied contracts.

County was not entitled to a dismissal of a health care provider's reimbursement claim for a prisoner's medical expenses under Miss. Code Ann. § 47-1-59 because such claims were separate and distinct from the state's law related to sovereign immunity and the claims were not implied contractual claims subject to immunity under Miss. Code Ann. § 11-46-3. *Vuncannon v. United States*, 650 F. Supp. 2d 577, 2009 U.S. Dist. LEXIS 52190 (N.D. Miss. 2009).

Building owner's claims against a city for money had and received and unjust enrichment constituted implied-in-law contract causes of action and were covered by the Mississippi Tort Claims Act because under Miss. Code Ann. § 11-46-3(1), the legislature intended for the state and its political subdivisions to be immune from suits for breach of an implied term or condition of any contract. *1704 21st Ave., Ltd v. City of Gulfport*, 988 So. 2d 412, 2008 Miss. App. LEXIS 457 (Miss. Ct. App. 2008).

4. Illustrative cases.

State university's head football coach had a viable claim for breach of the implied covenant of good faith and fair dealing against the university that was subject to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because, by its plain language, the Act applied to any claim for any breach of an implied term or condition of any contract. *Jones v. Miss. Insts. of Higher Learning*, 264 So.

3d 9, 2018 Miss. App. LEXIS 378 (Miss. Ct. App. 2018).

When a developer sued a city, the city's public utilities commission, and a utilities department (department) for damage to the developer's property in installing utility lines, the developer's contract claim failed because (1) no breach of a provision of a written contract was alleged, (2) no oral agreement allegedly breached was reflected in the minutes of a governmental body, and (3) a claim based on a breach of a contractual duty not to commit negligence was a tort claim. *Kelley v. Corinth PUC*, 200 So. 3d 1107, 2016 Miss. App. LEXIS 36 (Miss. Ct. App.), cert. denied, — So. 3d —, 2016 Miss. LEXIS 393 (Miss. 2016), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 394 (Miss. 2016), cert. denied, 203 So. 3d 599, 2016 Miss. LEXIS 403 (Miss. 2016).

Trial court was correct when it granted the Mississippi Department of Transportation summary judgment on all of the property owners' claims because all of their causes of action were barred by the design exemption; although there is a waiver of immunity for claims for money damages arising out of the State's alleged tortious conduct, there is no such waiver of immunity for injunctive relief in this context. *Garretson v. Miss. DOT*, 156 So. 3d 241, 2014 Miss. LEXIS 579 (Miss. 2014).

Miss. Code Ann. § 11-46-3 granted immunity to the state and its political sub-

divisions for breach of implied term or condition of any warranty or contract. Thus, although the decedent was indeed a third-party beneficiary of the written contract between the city and the development district, her estate was not permitted to pursue claims of breach of implied terms of that contract against the city or its political subdivisions. *City of Jackson v. Estate of Stewart*, 908 So. 2d 703, 2005 Miss. LEXIS 298 (Miss. 2005).

In a driver's suit against a county for failing to install warning signs near a curve, the evidence was sufficient to support a verdict for the county; compliance with the Manual on Uniform Traffic Control Devices was not conclusive as to the standard of care. *Donaldson v. Covington County*, 846 So. 2d 219, 2003 Miss. LEXIS 133 (Miss. 2003).

Although the "interim" version of Miss. Code Ann. § 11-46-3 (Supp. 1993) was in effect at the time of the police officer's automobile accident with plaintiff, the immunity exception provided in subsection (3) of that section was inapplicable because the operation and maintenance of a police department was not a function of proprietary nature; thus, the city was entitled to summary judgment on the issue of sovereign immunity. *Gale v. Thomas*, 759 So. 2d 1150, 1999 Miss. LEXIS 379 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

OPINIONS OF THE ATTORNEY GENERAL

Municipality does not have authority to waive immunity set forth in Section 11-46-1, et seq., by agreeing to indemnify railroad for claims; municipality does not have authority to agree to indemnify railroad for losses relating to use of license or arising from same location; city has authority to maintain shrubbery and vegetation on municipal property, but does not have authority to maintain shrubbery and vegetation on private property, such as railroad right-of-way. *Scott* Nov. 3, 1993, A.G. Op. #93-0727.

A nonprofit corporation established by a regional housing authority pursuant to § 43-33-11(i) is excluded from the provisions of the Mississippi Tort Claims Act. *McArty*, April 9, 1999, A.G. Op. #99-0150.

A for-profit corporation established by a nonprofit corporation which has been established by a regional housing authority pursuant to § 43-33-11(i) is excluded from the provisions of the Mississippi Tort Claims Act. *McArty*, April 9, 1999, A.G. Op. #99-0150.

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Governmental liability for failure to post highway deer crossing warning signs. 59 A.L.R.4th 1217.

State's liability for personal injuries from criminal attack in state park. 59 A.L.R.4th 1236.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody. 60 A.L.R.4th 942.

When is federal agency employee independent contractor, creating exception to United States waiver of immunity under Federal Tort Claims Act (28 U.S.C.S. § 2671). 166 A.L.R. Fed. 187.

Am. Jur.

51 Am. Jur. 2d (Rev), Limitation of Actions, §§ 72, 301.

57 Am. Jur. 2d, Municipal, County,

School, and State Tort Liability, §§ 44, 45 et seq.

64 Am. Jur. 2d, Public Works and Contracts, §§ 111 et seq.

63C Am. Jur. 2d, Public Officers and Employees, §§ 292 et seq.

72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 91- 93, 128.

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§ 11-46-5. Waiver of immunity; course and scope of employment; presumptions.

(1) Notwithstanding the immunity granted in Section 11-46-3, or the provisions of any other law to the contrary, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions; provided, however, immunity of a governmental entity in any such case shall be waived only to the extent of the maximum amount of liability provided for in Section 11-46-15.

(2) For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations.

(3) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(4) Nothing contained in this chapter shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

HISTORY: Laws, 1984, ch. 495, § 3; reenacted and amended, Laws, 1985, ch.

474, § 3; reenacted and amended, Laws, 1986, ch. 438, § 2; Laws, 1987, ch. 483, § 2; Laws, 1988, ch. 442, § 2; Laws, 1989, ch. 537, § 2; Laws, 1990, ch. 518, § 2; Laws, 1991, ch. 618, § 2; Laws, 1992, ch. 491 § 4, eff from and after passage (approved May 12, 1992).

Editor's Notes — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

Cross References — Immunity of vocational rehabilitation agency for the blind from suit for damages arising out of the operation of the agency's motor vehicles, see § 37-33-55.

Repeal of provisions requiring motor vehicle liability insurance on department of human service's vehicles on date sovereign immunity of state is waived as provided in this section, see § 37-33-55.

Federal Aspects — Eleventh Amendment to the Constitution of the United States, see USCS Const. Amend. 11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Applicability of waiver.
3. Course and scope of employment.
4. Evidence sufficient to prove liability.
5. Evidence insufficient to prove liability.
6. Employee.
7. Waiver of immunity defense.
8. Immunity.

1. In general.

Hospital was immune from a physician's defamation claim and IIED claim to the extent it referenced malicious conduct. *O'Hea v. George Reg'l Health & Rehab. Ctr.*, — So. 3d —, 2018 Miss. App. LEXIS 627 (Miss. Ct. App. Dec. 11, 2018), cert. denied, — So. 3d —, 2019 Miss. LEXIS 274 (Miss. Aug. 1, 2019).

In a case arising from a failure to renew an employment contract, an individual defamation claim against an alderman was barred by the one-year statute of limitations, and an allegation of continued slander “throughout the year” was insufficient to state an actionable claim within the limitations period. Moreover, the city was immune from liability on the defamation claim. *Williams v. City of Belzoni*, 229 So. 3d 171, 2017 Miss. App. LEXIS 126 (Miss. Ct. App. 2017).

City was immune from a former municipal judge's claims for defamation, slander, and intentional infliction of emotional distress. *Jones v. City of Hattiesburg*, 228 So. 3d 816, 2017 Miss. App. LEXIS 14 (Miss. Ct. App.), cert. denied, 229 So. 3d 118, 2017 Miss. LEXIS 372 (Miss. 2017).

Contractor's claim against a county engineer in his individual capacity for acts outside the scope of his employment were not subject to the presuit notice requirements of the Tort Claims Act because the claim was for tortious interference with a contract, which required proof of malice as an essential element. *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., serves to provide immunity from suit to the State of Mississippi and its political subdivisions; however, the MTCA waives immunity for claims for money damages arising out of the torts of government entities and employees while acting within the course and scope of their employment to the extent set forth in the MTCA. *Swindle v. Neshoba County Sch. Dist.*, 137 So. 3d 869, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 235 (Miss. 2014).

Where plaintiff parent sued defendant

school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity as Miss. Code Ann. § 11-46-5(1) permitted school districts to be sued. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 2006 U.S. App. LEXIS 21259 (5th Cir. Miss. 2006).

Finding that a city was not liable for a citizen's injuries under Miss. Code Ann. § 11-46-5(2) was reversed because the police acted with malice when they responded to a domestic disturbance call; a citizen was arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. The court held that the circuit court properly found that the immunity provisions of Miss. Code Ann. §§ 93-21-27 and 93-21-28 pertaining to domestic abuse incidents did not apply. *City of Jackson v. Calcote*, 910 So. 2d 1103, 2005 Miss. App. LEXIS 49 (Miss. Ct. App. 2005).

In a wrongful death suit, as Miss. Code Ann. § 11-46-9(1)(m) applied to any non-intentional/non-criminal acts alleged to have been committed upon a deceased inmate by a sheriff and/or his deputies in the course and scope of their employment, the trial court correctly dismissed claims alleging negligent acts by defendants and properly left an assault claim viable; however, it erred by dismissing other counts that alleged intentional criminal acts, as pursuant to Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2), these claims remained viable under the wrongful death statute,

Miss. Code Ann. § 11-7-13. *Lee v. Thompson*, 859 So. 2d 981, 2003 Miss. LEXIS 407 (Miss. 2003).

Dismissal of a minor student's suit against a school district and others over an alleged sexual assault by male students was affirmed, where the trial court's finding of no causation in fact, as the student failed to show she had been sexually assaulted, and that the district met its duty to use ordinary care to protect students from harm, were supported by the record. *T.K. v. Simpson County Sch. Dist.*, 846 So. 2d 312, 2003 Miss. App. LEXIS 470 (Miss. Ct. App. 2003).

Because the parents failed to support their contention that Miss. Code Ann. § 11-46-5 superseded the specific types of immunity set forth in Miss. Code Ann. § 11-46-9, failure to cite legal authority in support of an issue was a procedural bar on appeal. *Webb v. DeSoto County*, 843 So. 2d 682, 2003 Miss. LEXIS 186 (Miss. 2003).

School district was "political subdivision" of state and thus was protected by sovereign immunity from negligence suit arising from incident on August 26, 1993, after effective date of statute restoring sovereign immunity for state and its political subdivisions, but before effective date of statute largely waiving such immunity for political subdivisions. *Gressett by & Through Gressett v. Newton Separate Mun. Sch. Dist.*, 697 So. 2d 444, 1997 Miss. LEXIS 326 (Miss. 1997).

While decision to replace bridge with culvert on county road was discretionary one to which qualified immunity attached, fact issue existed as to whether county supervisor who determined that replacement was necessary, determined size of culvert needed, and supervised installation of culvert substantially exceeded his authority or was so grossly negligent that his action could be described as constructively intentional such that he was deprived of immunity, precluding summary judgment for supervisor on motorist's personal injury claim. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

2. Applicability of waiver.

Based on the clear language of Miss. Code Ann. § 11-46-5(2), the Supreme

Court of Mississippi holds the Mississippi Tort Claims Act does not apply to a malicious-prosecution claim against a governmental entity and its employees in their official capacity. *Univ. of Miss. Med. Ctr. v. Oliver*, 235 So. 3d 75, 2017 Miss. LEXIS 339 (Miss. 2017).

Trial court was correct when it granted the Mississippi Department of Transportation summary judgment on all of the property owners' claims because all of their causes of action were barred by the design exemption; although there is a waiver of immunity for claims for money damages arising out of the State's alleged tortious conduct, there is no such waiver of immunity for injunctive relief in this context. *Garretson v. Miss. DOT*, 156 So. 3d 241, 2014 Miss. LEXIS 579 (Miss. 2014).

To the extent the parents' and student's claim for intentional infliction of emotional distress (as a result of alleged repeated failure to protect the student from bullying) is based on malicious conduct, it was not barred by the Mississippi Tort Claims Act as to the individual school district officials and immunity was not waived as to the school district. *R.S. v. Starkville Sch. Dist.*, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

Store patron's 42 U.S.C.S. § 1983 and state law tort claims against the State of Mississippi, the Mississippi Department of Public Safety, the Mississippi Highway Patrol, and a state trooper, in his official capacity, in connection with the patron's detainment for shoplifting at a store were barred under U.S. Const. Amend. XI immunity and Miss. Code Ann. § 11-46-5(4); the *Ex Parte Young* exception did not apply because the patron was seeking monetary, not injunctive, relief. *Hopkins v. Mississippi*, 634 F. Supp. 2d 709, 2009 U.S. Dist. LEXIS 52686 (S.D. Miss. 2009).

Former state university student's defamation, breach of contract, and other unspecified state-law claims against the university, a state board of trustees, and several professors were barred under U.S. Const. Amend. XI, and Miss. Code Ann. § 11-46-5 did not waive such immunity because the student's suit was brought in federal court. *Washington v. Jackson State Univ.*, 532 F. Supp. 2d 804, 2006 U.S. Dist. LEXIS 97302 (S.D. Miss. 2006).

3. Course and scope of employment.

District court erred when it denied police officers' motion for summary judgment on homeowners' claims that the officers committed reckless infliction of emotional distress in violation of Mississippi law when they entered the wrong house during an operation to buy drugs and used force to subdue people in the house because the officers were immune from liability under the Mississippi Tort Claims Act; however, the district court did not err when it denied the officers' motion for summary judgment on the homeowners' claims under the Fourth Amendment to the U.S. Constitution because there were genuine issues of fact about whether the officers made reasonable efforts to identify the proper house and used excessive force. *Gerhart v. Barnes*, — F.3d —, 2018 U.S. App. LEXIS 6042 (5th Cir. Miss. Mar. 12, 2018), op. withdrawn, sub. op., 724 Fed. Appx. 316, 2018 U.S. App. LEXIS 10626 (5th Cir. Miss. 2018).

City enjoyed police-protection immunity because when an accident wreck occurred a police officer had been engaged in the performance of police-protection activities, responding to a call about an unconscious person; the officer had been remiss but not reckless as he drove through a parking lot, and because his actions did not rise above simple negligence, police-protection immunity applied. *City of Clinton v. Tornes*, 252 So. 3d 34, 2018 Miss. LEXIS 371 (Miss. 2018).

In a Mississippi Tort Claims Act case filed against the town and the chief of police resulting from the chief slapping plaintiff on her bottom while in the workplace, summary judgment was properly granted and her claim against the town for the failure to properly train and/or supervise the chief was properly dismissed because plaintiff failed to provide any legal authority that the town was required to provide training in addition to that training statutorily required by the Mississippi Law Enforcement Training Academy; the town nonetheless provided the chief with some local training before and after the incident; and the chief acted outside the course and scope of his law-enforcement duties when he committed the simple-assault. *Harris v. Town of*

Woodville, 196 So. 3d 1121, 2016 Miss. App. LEXIS 477 (Miss. Ct. App. 2016).

In a case in which property owners alleged that a county supervisor, a contractor, and a subcontractor engaged in a scheme to profit from a debris-removal contract between a county and the contractor by not paying the property owners for providing a dumpsite, the property owners were not required to give the county supervisor notice of their claims because the property owners alleged that the county supervisor's conduct amounted to fraud and malice and such conduct was outside the scope of the county supervisor's employment. *Bradley v. Kelley Bros. Contrs., Inc.*, 117 So. 3d 331, 2013 Miss. App. LEXIS 340 (Miss. Ct. App. 2013).

Where a teacher was terminated for accessing confidential student information, the teacher's malicious interference with employment claim survived because, regarding presuit notice under the Mississippi Torts Claims Act, the superintendent did not address the *Zumwalt* decision in rebuttal or attempt to distinguish it, and the determination of whether the superintendent acted in bad faith and "without right or justifiable cause" presented a fact issue. *Dearman v. Stone County Sch. Dist.*, — F. Supp. 3d —, 2014 U.S. Dist. LEXIS 37489 (S.D. Miss. Mar. 21, 2014).

Plaintiff VA patient conceded that a vascular surgeon was a state employee, and despite the patient's arguments to the contrary, the court found that there was no genuine issue of material fact that at the pertinent time, the surgeon was acting within the course and scope of his duties as a state employee, under Miss. Code Ann. §§ 11-46-5(3), 11-46-7(7), and, thus, immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. His involvement with the patient was solely by virtue of his being on-call pursuant to his employment with the university and its relationship to the VA facility. *Creel v. United States*, 512 F. Supp. 2d 574, 2007 U.S. Dist. LEXIS 39306 (S.D. Miss. 2007), rev'd, 598 F.3d 210, 2010 U.S. App. LEXIS 4252 (5th Cir. Miss. 2010).

Summary judgment in favor of the driver was affirmed because there was no issue of material fact that the driver, by

running a stop sign, was not acting outside the course and scope of her employment with the governmental entity, and it was undisputed that the claimants did not comply with the one year statute of limitations that accompanied actions under the Mississippi Tort Claims Act. *Jackson v. Hodge*, 911 So. 2d 625, 2005 Miss. App. LEXIS 647 (Miss. Ct. App. 2005).

Although a trial court had not erred when it held that a city was not liable for the acts of two police officers during and after an arrest of an African-American male because the officers had acted beyond the scope of their employment, the court erred when it found the city liable because it had negligently supervised the officers. There was not a scintilla of evidence presented to indicate that the city had any policy which encouraged the type of activity that the officers engaged in and there was no factual support for the factual holding that the city was deliberately indifferent to the rights of African-Americans. *City of Jackson v. Powell*, 917 So. 2d 59, 2005 Miss. LEXIS 755 (Miss. 2005).

In the patient's suit against the doctor and the state hospital for the death of the patient's unborn child, the Miller factors were more than sufficient to determine the status of physicians working for state hospitals, and the state hospital's disclaimer of liability for the doctor's acts did not change the legal status of the doctor, especially when the state hospital had admitted that the doctor was its employee. Thus, the trial court properly determined that the doctor was shielded from liability under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1-23. *Wright v. Quesnel*, 876 So. 2d 362, 2004 Miss. LEXIS 801 (Miss. 2004).

Where a deputy assaulted an individual in attempting to force the individual to sit for a casino security photograph, the deputy was acting for the casino, and not in his official capacity for the county, and the deputy was not entitled to immunity. *Kirk v. Crump*, 886 So. 2d 741, 2004 Miss. App. LEXIS 613 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1384 (Miss. 2004).

Dismissal of an inmate's claim against the employees of the Missouri Department of Corrections was proper where the

employees were acting within the course and scope of their employment; the inmate's negligence action was barred by the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., 11-46-5. *Whitt v. Gordon*, 872 So. 2d 71, 2004 Miss. App. LEXIS 56 (Miss. Ct. App. 2004).

Because a public school coach's actions at a fund-raiser where a plaintiff was injured were performed not for his own benefit but for the school's, the trial court properly held that he had acted in the scope of his employment and was thus immune from suit under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq. *Singley v. Smith*, 844 So. 2d 448, 2003 Miss. LEXIS 167 (Miss. 2003).

Proof by a preponderance of the evidence is necessary to overcome the presumption created by Miss. Code Ann. § 11-46-5 that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment. *Singley v. Smith*, 844 So. 2d 448, 2003 Miss. LEXIS 167 (Miss. 2003).

An employee can be found to be acting outside the course and scope of employment if acting with malice. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584, 2001 Miss. LEXIS 84 (Miss. 2001).

A county sheriff was acting in his official capacity when he responded to an emergency call at a residence and eventually shot a suspect; the plaintiff failed to offer any evidence to suggest that the sheriff was not acting as an employee of the county; and there was a wealth of evidence to show that the sheriff acted in his official capacity. *Holmes v. Defer*, 722 So. 2d 624, 1998 Miss. LEXIS 530 (Miss. 1998), overruled, *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999).

Where the plaintiff sued the defendant city for false arrest, subsection (2) did not bar the city's liability. *Foster v. Noel*, 715 So. 2d 174, 1998 Miss. LEXIS 270 (Miss. 1998).

4. Evidence sufficient to prove liability.

In a child's suit against the Mississippi Department of Human Services (DHS),

failure to investigate a child's allegations of sexual abuse by an employee of a youth care facility was a ministerial act for which DHS could be held liable. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253, 2007 Miss. App. LEXIS 503 (Miss. Ct. App. 2007).

5. Evidence insufficient to prove liability.

Caucasian retired school principal's intentional infliction of emotional distress claim, arising from her alleged constructive discharge, was based on malicious conduct, so the School District was immune from liability. *Idom v. Natchez-Adams Sch. Dist.*, 115 F. Supp. 3d 792, 2015 U.S. Dist. LEXIS 91321 (S.D. Miss. 2015).

Finding against the student in her action against a state university and a professor after she suffered a third-degree burn at an iron pour demonstration was improper under Miss. Code Ann. § 11-46-9(1)(d) because the university was not protected by discretionary function immunity and was liable for the professor's negligence pursuant to the waiver of sovereign immunity codified at Miss. Code Ann. § 11-46-5; it was difficult to fathom how the professor's failure to put down dry sand before the pour involved a policy judgment of a social, political, or economic nature. *Pritchard v. Von Houten*, 960 So. 2d 568, 2007 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 391 (Miss. 2007).

When a teacher's aide was escorting an autistic child to his classroom, the child became agitated while the aide continued to move him through the hallway. The child suffered bruises as a result of the teacher's aide's fully sensible attempts to restrain him, and no treatment or medication was warranted or prescribed for the bruises; the aide's restraint of the child constituted control and discipline under Miss. Code Ann. § 37-11-57, and the circuit court properly applied Miss. Code Ann. § 11-46-9(1)(x) in finding that said actions did not constitute wanton and willful conduct to allow the parents to recover damages. *Pigford v. Jackson Pub. Sch. Dist.*, 910 So. 2d 575, 2005 Miss. App. LEXIS 90 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 545 (Miss. 2005).

Officer didn't show malice in an arrest in which the arrestee allegedly suffered a sprained wrist, and was immune from liability. The district, as well, was immune from liability. *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So. 2d 1013, 2004 Miss. App. LEXIS 225 (Miss. Ct. App. 2004).

Primary issue was whether the physicians were acting as employees of the University of Mississippi Medical Center (UMMC), or whether they were independent contractors for purposes of immunity or liability, and although the physicians did wear two hats, because they were entitled to engage, to an extent, in separate private practice, the appellate court, applying the standard of *Miller v. Meeks*, held that the State exercised reasonable control over the physicians, including the power to terminate the physicians' contract, the uncontroverted evidence was that the physicians were acting as employees of UMMC at the time of the subject surgery on the complaining patient, and pursuant to Mississippi's former sovereign immunity law, Miss. Code Ann. § 11-46-7(2), the physicians were immune from liability. *Brown v. Warren*, 858 So. 2d 168, 2003 Miss. App. LEXIS 965 (Miss. Ct. App. 2003).

Where an individual worked for the Mississippi Bureau of Narcotics making drug buys, and was caught in the crossfire between a dealer and a Bureau officer, all the individual was able to show with regard to his negligence claim, was that the Bureau and its agents made a series of challengeable choices, from the level of training before sending an officer on a drug buy, to the directions given that officer; bad judgment; however, was insufficient for liability where the individual offered no evidence to meet the evidentiary burden of the reckless disregard standard. *Lippincott v. Miss. Bureau of Narcotics*, 856 So. 2d 465, 2003 Miss. App. LEXIS 282 (Miss. Ct. App. 2003).

6. Employee.

Although a patient alleged that he was injured by the negligence of a doctor who was an independent contractor of a hospital, the Mississippi Tort Claims Act provided immunity to the state and its politi-

cal subdivisions, such as the hospital, for the negligence of its independent contractors. Therefore, the trial court properly entered summary judgment in favor of the hospital. *Brown v. Delta Reg'l Med. Ctr.*, 997 So. 2d 195, 2008 Miss. LEXIS 498 (Miss. 2008).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, the trial court determined that he was an employee of the community hospital for purposes of immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-5. The partnership was an "instrumentality" of the community hospital and was entitled to the protections, limitations and immunities of the MTCA. *Estate of Grimes v. Warrington*, 982 So. 2d 365, 2008 Miss. LEXIS 101 (Miss. 2008).

7. Waiver of immunity defense.

State university's head football coach had a viable claim for breach of the implied covenant of good faith and fair dealing against the university that was subject to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because malice was not an essential element of the claim. *Jones v. Miss. Insts. of Higher Learning*, 264 So. 3d 9, 2018 Miss. App. LEXIS 378 (Miss. Ct. App. 2018).

A doctor's participation in a medical malpractice action for eleven years, coupled with his failure to pursue the immunity affirmative defense under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1, et seq., constituted a waiver of such defense. *Aikens v. Whites*, 8 So. 3d 139, 2008 Miss. LEXIS 481 (Miss. 2008).

8. Immunity.

Under the statute, the city possessed immunity from the employee's slander claim, as well as to the claims alleging malicious conduct by another city worker. *Mark v. City of Hattiesburg*, — So. 3d —, 2019 Miss. App. LEXIS 2 (Miss. Ct. App. Jan. 8, 2019).

Summary judgment was properly granted to the medical center defendants on the fraud, misrepresentation, civil conspiracy, and slander claim where the center was immune from those intentional

tort claims. *Bissette v. Univ. of Miss. Med. Ctr.*, — So. 3d —, 2019 Miss. App. LEXIS 303 (Miss. Ct. App. June 25, 2019).

OPINIONS OF THE ATTORNEY GENERAL

Municipality does not have authority to waive immunity set forth in Section 11-46-1, et seq., by agreeing to indemnify railroad for claims; municipality does not have authority to agree to indemnify railroad for losses relating to use of license or arising from same location; city has authority to maintain shrubbery and vegetation on municipal property, but does not have authority to maintain shrubbery and vegetation on private property, such as

railroad right-of-way. *Scott* Nov. 3, 1993, A.G. Op. #93-0727.

Members of Foster Care Review Board enjoy public official immunity for any of their acts arising out of and within course and scope of their duties on Board pursuant to Section 11-46-9 provided that conduct does not constitute fraud, malice, libel, slander, defamation or criminal offense. *Tardy*, Jan. 5, 1994, A.G. Op. #93-0972.

RESEARCH REFERENCES

ALR.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body. 65 A.L.R.2d 1278.

Immunity of police or other law enforcement officer from liability in defamation action. 100 A.L.R.5th 341.

Liability of municipal corporation or other governmental entity for injury or death caused by action or inaction of off-duty police officer. 36 A.L.R.5th 1.

Tort liability of public schools and institutions of higher learning for accident involving motor vehicle operated by student. 85 A.L.R.5th 301.

When is federal agency employee independent contractor, creating exception to United States waiver of immunity under Federal Tort Claims Act (28 U.S.C.S. § 2671). 166 A.L.R. Fed. 187.

Am. Jur.

18 Am. Jur. Pl & Pr Forms (Rev), Municipal, School, and State Tort Liability, Forms 1 et seq.

Law Reviews.

The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

Constitutional Law – Fourth Amendment – The Warrantless Use of Thermal Imaging Technologies Is Unconstitutional, 71 Miss. L.J. 325, Fall, 2001.

§ 11-46-6. Repealed.

Repealed by Laws of 1992 Special Session, ch. 3, § 2, eff from and after passage (approved September 16, 1992).

[Laws, 1987, ch. 483, § 3; Laws, 1988, ch. 442, § 3; Laws, 1989, ch. 537, § 3; Laws, 1990, ch. 518, § 3; Laws, 1991, ch. 618, § 3; Laws, 1992, ch. 491, § 5]

Editor's Notes — Former § 11-46-6 prescribed the claims and causes of action to which Chapter 46, Title 11, Miss. Code of 1972 applied.

§ 11-46-7. Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee.

(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

(2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

(3) From and after July 1, 1993, as to the state, from and after October 1, 1993, as to political subdivisions, and subject to the provisions of this chapter, every governmental entity shall be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided, however, that to the extent that a governmental entity has in effect a valid and current certificate of coverage issued by the board as provided in Section 11-46-17, or in the case of a political subdivision, such political subdivision has a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its employee shall be secondary to the obligation of any such insurer or indemnitor, whose obligation shall be primary. The provisions of this subsection shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

(4) The responsibility of a governmental entity to provide a defense for its employee shall apply whether the claim is brought in a court of this or any other state or in a court of the United States.

(5) A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same suit brought on the claim against the governmental entity or its employee.

(6) The duty to defend and to pay any judgment as provided in subsection (3) of this section shall continue after employment with the governmental entity has been terminated, if the occurrence for which liability is alleged happened within the course and scope of duty while the employee was in the employ of the governmental entity.

(7) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(8) Nothing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity. Any immunity or other bar to a civil suit under Mississippi or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

HISTORY: Laws, 1984, ch. 495, § 5; reenacted and amended, Laws, 1985, ch. 474, § 4; reenacted and amended, Laws, 1986, ch. 438, § 3; Laws, 1987, ch. 483, § 4; Laws, 1988, ch. 442, § 4; Laws, 1989, ch. 537, § 4; Laws, 1990, ch. 518, § 4; Laws, 1991, ch. 618, § 4; Laws, 1992, ch. 491 § 6; Laws, 1993, ch. 476, § 3, eff from and after passage (approved April 1, 1993).

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Cross References — Statute of limitations and notice requirements, see § 11-46-11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.
3. Course and scope of duties.
4. Applicability.
5. Joinder.
6. Employee's criminal conduct.

1. In general.

Trial court erred in denying a city and a police officer summary judgment in a driver's action alleging that the officer's negligent actions caused an accident and that the city was vicariously liable for his operation of his vehicle because the Mississippi Tort Claims Act (MTCA) provided

the exclusive remedy for the action, and under the MTCA, neither the officer nor the city could be liable. *City of Clinton v. Tornes*, 252 So. 3d 34, 2018 Miss. LEXIS 371 (Miss. 2018).

Contractor's claim against a county engineer in his individual capacity for acts outside the scope of his employment were not subject to the presuit notice requirements of the Tort Claims Act because the claim was for tortious interference with a contract, which required proof of malice as an essential element. *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

Under Miss. Code Ann. § 11-55-7(a)-(b), although a former professor had no hope of success on his negligence-based claims against university staff who were immune, they were not entitled to fees incurred defending against those claims after the professor conceded them in his responses to summary judgment motions. *Payne v. Univ. of S. Miss.*, — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 73028 (S.D. Miss. June 5, 2015), *aff'd*, 681 Fed. Appx. 384, 2017 U.S. App. LEXIS 4495 (5th Cir. Miss. 2017).

Five-part test articulated by the Mississippi Supreme Court to analyze a doctor's employment status for purposes of Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), in a case involving a doctor who served as both a contract employee for a state hospital and also as a solo practitioner, is not applicable in cases where a doctor has no direct contractual relationship with a state hospital. *Carpenter v. Reinhard*, 2005 U.S. Dist. LEXIS 37207 (N.D. Miss. July 15, 2005).

Trial court did not err in dismissing the decedent's estate's negligence action against the circuit court clerks for failing to enroll a foreign judgment, which allegedly prevented the estate from being able execute the judgment, because according to Miss. Code Ann. § 11-46-7(1) of the Mississippi Tort Claims Act (MTCA), when bringing suit against a governmental official for actions taken in his or her official capacity, a plaintiff must comply with the provisions of the MTCA. Among the provisions of the MTCA with which the estate failed to comply was the one-year statute of limitations and the notice

of claim requirements of Miss. Code Ann. § 11-46-11. *Estate of Spiegel v. Western Sur. Co.*, 908 So. 2d 859, 2005 Miss. App. LEXIS 525 (Miss. Ct. App. 2005).

Absent evidence showing otherwise, state environmental agencies and their employee were immune to landowners' claims of tortious interference with contract and business relations concerning the development of protected wetlands that belonged to the landowners. *Dunston v. Miss. Dep't of Marine Res.*, 892 So. 2d 837, 2005 Miss. App. LEXIS 66 (Miss. Ct. App. 2005).

Deputy responding to a call from a fellow officer was not speeding and did not sound a siren because the deputy did not want there to be any accidents resulting from motorists coming to an abrupt stop, and while the deputy failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of the deputy, the deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others or a willingness that harm should follow; thus, summary judgment for the county was proper. *Kelley v. Grenada County*, 859 So. 2d 1049, 2003 Miss. App. LEXIS 1080 (Miss. Ct. App. 2003).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003).

Mississippi Torts Claims Act provides the exclusive civil remedy for claims of negligence against a school district. *Harris v. McCray*, 867 So. 2d 188, 2003 Miss. LEXIS 553 (Miss. 2003).

Where a widow filed an action against a city, its police chief, and two police officers arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint as

to her claim under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., because she had specified and separated the negligence-and tort-based state law claims from the constitutional tort claims brought pursuant to 42 U.S.C.S. § 1983 in her amended complaint; under Miss. Code Ann. § 11-46-7(1) the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers; and Miss. R. Civ. P. 8(a) only required that notice of a claim be given. *Elkins v. McKenzie*, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Former university professor's tortious interference with contract claim against the university that formerly employed her and its officials was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann. § 11-46-11(3) as it was not timely filed. *Black v. Ansah*, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), op. withdrawn, sub. op., 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

City was liable for the wrongful death of a driver under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., because several officers acted in reckless disregard of the safety of the driver when they initiated a police chase in violation of department policy. *City of Jackson v. Brister*, 838 So. 2d 274, 2003 Miss. LEXIS 79 (Miss. 2003).

Court affirmed the trial court's dismissal of a physician, a faculty neurosurgeon at a state medical center, from a patient's medical malpractice action on the grounds of immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2); there was nothing to support the patient's claim that the physician was an independent contractor because the physician performed the patient's operation in front of a surgical resident in furtherance of the resident's education, given that the state exercised sufficient control over the physician, and the fact

that the physician exercised independent judgment in performing the operation did not make the physician an independent contractor. *Clayton v. Harkey*, 826 So. 2d 1283, 2002 Miss. LEXIS 295 (Miss. 2002).

In a case where a mother filed a lawsuit for damages after her son died in police custody, the trial court correctly granted summary judgment to a sheriff and a sheriff's deputy because the mother failed to also sue the county. *Conrod v. Holder*, 825 So. 2d 16, 2002 Miss. LEXIS 249 (Miss. 2002).

Trial court erred in granting summary judgment on the ground of governmental immunity to two psychiatrists who worked for a medical center at a state school, where a conservator claimed that his father had suffered side effects from prescription drugs the psychiatrists prescribed, as genuine issues of material fact existed as to whether the psychiatrists were protected by immunity for their actions. *Bennett v. Madakasira*, 821 So. 2d 794, 2002 Miss. LEXIS 107 (Miss. 2002).

Where doctor was hired as an employee of a community hospital, which was afforded immunity protection under Miss. Code Ann. § 41-13-11(5), and the doctor was found to be an employee of the hospital rather than an independent contractor, the patient was not able to proceed with a medical malpractice action against the doctor because the doctor was entitled to sovereign immunity protection. *Gilchrist v. Veach*, 807 So. 2d 485, 2002 Miss. App. LEXIS 79 (Miss. Ct. App. 2002).

Under the plain language of the Mississippi Tort Claims Act even though a government employee may not be personally liable for acts and omissions occurring within the course and scope of the employee's duties, the employee's still may be joined in the action against the employer, if the acts or omissions are ones for which the governmental entity may be liable. *Stewart v. City of Jackson*, 804 So. 2d 1041, 2002 Miss. LEXIS 16 (Miss. 2002).

Statute provided the exclusive civil remedy against a governmental entity and its employees for acts or omissions that give rise to a suit; any claim filed against a governmental entity and its employees had to be brought under the statutory scheme. *City of Jackson v. Sut-*

ton, 797 So. 2d 977, 2001 Miss. LEXIS 259 (Miss. 2001).

Where a school district was dismissed from a motor vehicle personal injury action because it was never served with process and the plaintiffs did not appeal that dismissal, the school district employee vehicle operator was not individually liable, due to immunity granted to an employee acting within the course and scope of her employment. *Cotton v. Paschall*, 782 So. 2d 1215, 2001 Miss. LEXIS 25 (Miss. 2001).

No claim upon which relief could be granted was stated in an action alleging that a student was physically injured when a teacher administered excessive corporal punishment to him where it was alleged that the teacher was acting within the course and scope of her employment. *Duncan v. Chamblee*, 757 So. 2d 946, 1999 Miss. LEXIS 190 (Miss. 1999).

Nurses employed by a community hospital owned by a county were immune under subsection (2) of this section for alleged negligence which occurred within the course and scope of their duties. *Jones v. Baptist Mem'l Hospital-Golden Triangle, Inc.*, 735 So. 2d 993, 1999 Miss. LEXIS 106 (Miss. 1999).

2. Constitutionality.

Statute was not in conflict with Mississippi Constitution because it did not violate due process; there was no property right to sue the State and without such a property interest there could be no due process violation. *City of Jackson v. Sutton*, 797 So. 2d 977, 2001 Miss. LEXIS 259 (Miss. 2001).

3. Course and scope of duties.

District court erred when it denied police officers' motion for summary judgment on homeowners' claims that the officers committed reckless infliction of emotional distress in violation of Mississippi law when they entered the wrong house during an operation to buy drugs and used force to subdue people in the house because the officers were immune from liability under the Mississippi Tort Claims Act; however, the district court did not err when it denied the officers' motion for summary judgment on the homeown-

ers' claims under the Fourth Amendment to the U.S. Constitution because there were genuine issues of fact about whether the officers made reasonable efforts to identify the proper house and used excessive force. *Gerhart v. Barnes*, — F.3d —, 2018 U.S. App. LEXIS 6042 (5th Cir. Miss. Mar. 12, 2018), op. withdrawn, sub. op., 724 Fed. Appx. 316, 2018 U.S. App. LEXIS 10626 (5th Cir. Miss. 2018).

Police officer could not be held individually liable because pursuant to the Mississippi Tort Claims Act, he was acting within the course and scope of his employment when an accident occurred; thus, the officer's presence as a named defendant stemmed only from his being a representative of the city, and a driver had no claim against the officer individually. *City of Clinton v. Tornes*, 252 So. 3d 34, 2018 Miss. LEXIS 371 (Miss. 2018).

Employee of a state administrative agency was not personally liable when a claimant alleged that the employee falsely imprisoned the claimant in the lobby of a state office building because the employee was immune from personal liability, under Miss. Code Ann. § 11-46-7(2), in that, at all relevant times, the employee was acting within the course and scope of the employee's employment and was entitled to discretionary immunity, under Miss. Code Ann. § 11-46-9(1)(d). *Bell v. Miss. Dep't of Human Servs.*, 126 So. 3d 999, 2013 Miss. App. LEXIS 826 (Miss. Ct. App. 2013).

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to bullying by other students, and failure to discipline those bullies, thus, Miss. Cod Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did not bar those claims; finding that the alleged conduct was ministerial rather than discretionary did not remove the absolute personal immunity afforded the individual officials for actions committed within the course and scope of employment. *R.S. v. Starkville Sch. Dist.*, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' supersedeas bonds pre-

vented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment, he was not personally liable to the creditors; therefore, he was not obligated to indemnify the surety on his performance bond. *Newton County v. State ex rel. Dukes*, 133 So. 3d 819, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 8 (Miss. 2014), aff'd in part and rev'd in part, 133 So. 3d 805, 2014 Miss. LEXIS 143 (Miss. 2014).

In judgment creditors' suit alleging a court clerk's negligence in approving a judgment debtors' supersedeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment when he approved the bonds, he and the county were immune from liability. *Newton County v. State ex rel. Dukes*, 133 So. 3d 819, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 8 (Miss. 2014), aff'd in part and rev'd in part, 133 So. 3d 805, 2014 Miss. LEXIS 143 (Miss. 2014).

Under Miss. Code Ann. § 11-46-7(2), a city was not liable for its police officers' sexual contact with a runaway child because they were not acting within the course and scope of their employment at the time they engaged in the sexual misconduct. *City of Jackson v. Sandifer*, 107 So. 3d 978, 2013 Miss. LEXIS 60 (Miss. 2013).

Where a teacher was terminated for accessing confidential student information, the teacher's malicious interference with employment claim survived because, regarding presuit notice under the Mississippi Torts Claims Act, the superintendent did not address the Zumwalt decision in rebuttal or attempt to distinguish it, and the determination of whether the superintendent acted in bad faith and "without right or justifiable cause" presented a fact issue. *Dearman v. Stone County Sch. Dist.*, — F. Supp. 3d —, 2014 U.S. Dist. LEXIS 37489 (S.D. Miss. Mar. 21, 2014).

In an action filed by a husband and wife against a driver, the housing authority of a city, and the housing authority's insurer, the trial court did not abuse its discretion in setting aside entries of default against the driver and the insurer pursuant to

Miss. R. Civ. P. 55(c) because vacation of the default entry for the driver and insurer would serve the interests of justice; the trial court determined that the insurer was never a proper defendant in the lawsuit, and under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), the driver could not be held personally liable. *King v. Bunton*, 43 So. 3d 361, 2010 Miss. LEXIS 162 (Miss. 2010).

The trial court did not err in finding in favor of a driver in her action against a city and a police officer under the Mississippi Tort Claims Act (MTCA), because there was substantial, credible evidence to support a finding of reckless disregard for public safety on the part of the officer. The officer knew that there was a good chance that traffic would be coming through the green light of the busy intersection and she proceeded against her own red light, even though her view to the left was completely blocked by a truck; therefore, the trial court did not err in finding that the officer's conduct went beyond mere negligence to reckless disregard and that the city was therefore not immune from liability under the MTCA. *City of Jackson v. Presley*, 40 So. 3d 578, 2009 Miss. App. LEXIS 793 (Miss. Ct. App. 2009), rev'd, 40 So. 3d 520, 2010 Miss. LEXIS 385 (Miss. 2010).

Store patron's 42 U.S.C.S. § 1983 and state law tort claims against the State of Mississippi, the Mississippi Department of Public Safety, the Mississippi Highway Patrol, and a state trooper, in his official capacity, in connection with the patron's detainment for shoplifting at a store were barred under U.S. Const. Amend. XI immunity and Miss. Code Ann. § 11-46-5(4), but if the trooper, who was working as a store security guard during his off-duty hours, was acting in his capacity as a public employee, then to the extent the patron was alleging that the trooper acted with malice and thereby exceeded the course and scope of his employment, he could potentially be held individually or personally liable under Miss. Code Ann. § 11-46-7(2), but the State of Mississippi, the Mississippi Department of Public Safety, and the Mississippi Highway Patrol could not. *Hopkins v. Mississippi*, 634 F. Supp. 2d 709, 2009 U.S. Dist. LEXIS 52686 (S.D. Miss. 2009).

Plaintiff VA patient conceded that a vascular surgeon was a state employee, and despite the patient's arguments to the contrary, the court found that there was no genuine issue of material fact that at the pertinent time, the surgeon was acting within the course and scope of his duties as a state employee, under Miss. Code Ann. §§ 11-46-5(3), 11-46-7(7), and, thus, immune under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. His involvement with the patient was solely by virtue of his being on-call pursuant to his employment with the university and its relationship to the VA facility. *Creel v. United States*, 512 F. Supp. 2d 574, 2007 U.S. Dist. LEXIS 39306 (S.D. Miss. 2007), rev'd, 598 F.3d 210, 2010 U.S. App. LEXIS 4252 (5th Cir. Miss. 2010).

There was substantial credible evidence to conclude that the instructor was acting within the course and scope of his employment at the time of the student's injuries; there was nothing on the tape to indicate that the instructor was doing anything other than what he was told. *Hayes v. Univ. of Southern Miss.*, 952 So. 2d 261, 2006 Miss. App. LEXIS 614 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 190 (Miss. 2007).

Summary judgment in favor of the driver was affirmed because there was no issue of material fact that the driver, by running a stop sign, was not acting outside the course and scope of her employment with the governmental entity, and it was undisputed that the claimants did not comply with the one year statute of limitations that accompanied actions under the Mississippi Tort Claims Act. *Jackson v. Hodge*, 911 So. 2d 625, 2005 Miss. App. LEXIS 647 (Miss. Ct. App. 2005).

Although a trial court had not erred when it held that a city was not liable for the acts of two police officers during and after an arrest of an African-American male because the officers had acted beyond the scope of their employment, the court erred when it found the city liable because it had negligently supervised the officers. There was not a scintilla of evidence presented to indicate that the city had any policy which encouraged the type of activity that the officers engaged in and

there was no factual support for the factual holding that the city was deliberately indifferent to the rights of African-Americans. *City of Jackson v. Powell*, 917 So. 2d 59, 2005 Miss. LEXIS 755 (Miss. 2005).

In plaintiff's personal injury action against a police officer, court did not err in finding that the officer was not individually liable under Miss. Code Ann. § 11-46-7(2) because the officer was acting within the course and scope of his employment at the time when he stopped plaintiff's vehicle and drew his gun. Officer had received a call that two vehicles were speeding and that shots had been fired. *Smith v. Brookhaven*, 914 So. 2d 180, 2005 Miss. App. LEXIS 50 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 750 (Miss. 2005).

Officer didn't show malice in arrest in which the arrestee allegedly suffered a sprained wrist, and was immune from liability. The district, as well, was immune from from liability. *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So. 2d 1013, 2004 Miss. App. LEXIS 225 (Miss. Ct. App. 2004).

As a security officer who hugged and kissed appellant after arresting her for driving under the influence had not been acting within the scope of the officer's employment with a water district, appellant's claims against the district were properly dismissed on summary judgment. *Cockrell v. Pearl River Valley Water Supply Dist.*, 865 So. 2d 357, 2004 Miss. LEXIS 69 (Miss. 2004).

Where the driver of a car was stopped during a police chase and then the driver gunned the engine and hit defendant police officer as the car again sped away, and the officer shot at the car, hitting plaintiff, a passenger in the car, the passenger's state law claims of assault, battery, aggravated assault, false arrest, false imprisonment, and intentional infliction of emotional distress failed, as none of the state law claims alleged misconduct occurring outside the scope of employment under Miss. Code Ann. § 11-46-7(2); rather, the officer's actions were within the course and scope of employment. *Herman v. City of Shannon*, 296 F. Supp. 2d 709, 2003 U.S. Dist. LEXIS 24859 (N.D. Miss. 2003), aff'd, 104 Fed. Appx. 398, 2004 U.S. App. LEXIS 14624 (5th Cir. Miss. 2004).

Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2) barred plaintiff's state law claims against the police chief and the officer because the wrongful arrest of plaintiff occurred in the scope and course of their employment, but did not bar the state law claims against the city under Miss. Code Ann. § 11-46-9(1)(c) because the officer was acting within the scope of his employment when he acted with reckless disregard in the arrest of the mother. *Craddock v. Hicks*, 314 F. Supp. 2d 648, 2003 U.S. Dist. LEXIS 25637 (N.D. Miss. 2003).

State officials were immune from liability following the death of a 15-year-old who was incarcerated at the Oakley Training School, as a nurse's misdiagnosis of meningitis as a cold virus or flu did not establish "deliberate indifference" or give rise to cause of action; under the Mississippi Tort Claims Act officials and employees had immunity, under Miss. Code Ann. §§ 11-46-7(2) and 11-46-9-(1)(m). *Mallery v. Taylor*, 805 So. 2d 613, 2002 Miss. App. LEXIS 39 (Miss. Ct. App. 2002).

An employee can be found to be acting outside the course and scope of employment if acting with malice. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584, 2001 Miss. LEXIS 84 (Miss. 2001).

Physicians employed by the University of Mississippi Medical Center were entitled to immunity in a medical malpractice action arising from their conduct during a 10 day period in January 1993 where (1) there was no dispute that the physicians were employees of the medical center acting within the course and scope of their employment, (2) the patient was a Medicaid patient who did not choose any particular doctor, and (3) the physicians were assigned to the patient in accordance with their duties at the medical center as a public hospital and an educational institution. *Sullivan v. Washington*, 768 So. 2d 881, 2000 Miss. LEXIS 193 (Miss. 2000).

Plaintiffs' assertion that the police officer was acting within the course of his employment at the time of the accident was fatal to her attempt to hold the officer personally liable because subsection (2) precludes liability for acts of an officer that occur within the course and scope of

his duties. *Gale v. Thomas*, 759 So. 2d 1150, 1999 Miss. LEXIS 379 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Statute under which governmental entity and its employees are immune from any claim asserted by prison inmate could not be applied retroactively to bar action brought against prison physicians and other medical personnel following death of prison inmate, which occurred prior to effective date of statute, as state prison physicians and other prison personnel were not protected by sovereign immunity as it existed prior to enactment of statute. *Sparks v. Kim*, 701 So. 2d 1113, 1997 Miss. LEXIS 619 (Miss. 1997).

4. Applicability.

Trial court properly entered a judgment in favor of a city and its police department and found that were entitled to governmental immunity because, while a police officer was negligent in driving his vehicle when he hit a student with his patrol car in front of a school after a football game ended, his conduct did not rise to the level of reckless disregard. *Crisler v. City of Crystal Springs*, 171 So. 3d 588, 2015 Miss. App. LEXIS 403 (Miss. Ct. App. 2015).

Ambulance service was entitled to Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., protections because the ambulance service was an instrumentality of governmental entities, specifically a city, a county, and a county general hospital, as the operations of the ambulance service were overwhelmingly controlled by the governmental entities, which owned the ambulance service. *Woodall v. AAA Ambulance Serv.*, 161 So. 3d 1071, 2015 Miss. LEXIS 188 (Miss. 2015).

Trial court was correct when it granted the Mississippi Department of Transportation summary judgment on all of the property owners' claims because all of their causes of action were barred by the design exemption; subsection (1) is unambiguous and provides that any claim for money damages arising out of the State's tortious acts must be brought under the Mississippi Tort Claims Act. *Garretson v. Miss. DOT*, 156 So. 3d 241, 2014 Miss. LEXIS 579 (Miss. 2014).

Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., provides the exclusive remedy against a governmental entity or its employee for the act or omission which has given rise to a suit. *Swindle v. Neshoba County Sch. Dist.*, 137 So. 3d 869, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 235 (Miss. 2014).

Injured motorist's negligence action against a county was governed by the provisions of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., because the MTCA was the exclusive remedy for claims against governmental entities and their employees. *Alexander v. Newton County*, 124 So. 3d 688, 2013 Miss. App. LEXIS 197 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 565 (Miss. 2013).

In a medical malpractice action, summary judgment was properly granted in favor of defendant doctor because he was employed by an entity covered by the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23 (2002), and was thus afforded the MTCA's protection and because plaintiff patient failed to provide a timely notice of the claim under the MTCA. Because MTCA's one-year statute of limitations had expired, the patient was barred from asserting a claim for the wrongful death of her 10-month-old son. *Gorton v. Rance*, 52 So. 3d 351, 2011 Miss. LEXIS 62 (Miss. 2011).

Plaintiff landowner's state law claims were based on constitutional violations of due process and governmental takings and not based or founded on torts. Therefore, any immunity under the Mississippi Tort Claims Act defendant city sought to assert was inapplicable. *Pearson v. City of Louisville*, 2008 U.S. Dist. LEXIS 89580 (N.D. Miss. Nov. 4, 2008).

Physician was entitled to the immunity provided under Miss. Code Ann. § 11-46-7 with respect to a patient's claim of negligence per se because there was no evidence that he acted maliciously when he evaluated her for involuntary commitment for mental health treatment; moreover, the patient did not dispute that the physician was subject immunity under § 11-46-7 and did not explain how an exception for intentional torts applied to a

claim for per se negligence in violating a statute or negligently providing mental care. *Tebo v. Tebo*, 550 F.3d 492, 2008 U.S. App. LEXIS 25296 (5th Cir. Miss. 2008).

Where a county hospital and its employee were sued in tort for injuries related to a car accident that occurred when the employee was running an errand for her employer, the dismissal of the employee from the action under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et seq., did not act as a release of her insurance company. The insurance company was contractually obligated to defend or indemnify the county hospital as an additional insured under the language of the insurance policy; Miss. Code Ann. § 11-46-7(5) did not apply. *Franklin County Mem'l Hosp. v. Miss. Farm Bureau Mut. Ins. Co.*, 975 So. 2d 872, 2008 Miss. LEXIS 122 (Miss. 2008).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were acting in their official roles in enforcing a facially valid Virginia custody order granting custody of children to the children's mother, immunity under Miss. Code Ann. § 11-46-7(2) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705, 2007 Miss. App. LEXIS 252 (Miss. Ct. App. 2007).

Dismissal of the decedent's mother's and a student's action against a state university resulting from a shooting on campus was appropriate where Miss. Code Ann. § 11-46-7(1) provided the exclusive civil remedy against state and governmental entities and the underlying act of the claims was the fact that the gunman shot the victims; there was no authority suggesting that the university, through an employee, had a duty to warn the victims of the dangerous conditions of the gunman's character. *Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 2006 Miss. App. LEXIS 406 (Miss. Ct. App. 2006).

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to res judicata; while school districts'

sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 2006 U.S. App. LEXIS 21259 (5th Cir. Miss. 2006).

From the time of the resident's injury on May 7, 2001, she was under a duty to exercise due diligence in ascertaining the proper defendant; the warranty deed, which listed Forrest County as the owner of the property, was available to the resident during the entire period, had she chosen to exercise due diligence by examining it; her own failure to exercise due diligence did not excuse her duty to comply with the procedural requirements of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. *Davis v. Forrest Royale Apts.*, 938 So. 2d 293, 2006 Miss. App. LEXIS 172 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 545 (Miss. 2006).

Doctor was not immune under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), from a patient's malpractice suit because the doctor was an independent contractor, rather than an employee of a county hospital, where the doctor's contract was with a private corporation that assigned her to work at the hospital and issued her paycheck. *Carpenter v. Reinhard*, 2005 U.S. Dist. LEXIS 37207 (N.D. Miss. July 15, 2005).

Grant of summary judgment against the patient in her medical malpractice action against the physician was proper where the physician was an employee of the state university medical center and therefore an employee of the state of Mississippi. Thus, he was immune from liability under Miss. Code Ann. § 11-46-7(2) of the Mississippi Tort Claims Act, Miss.

Code Ann. § 11-46-1 et seq. *Owens v. Thomae*, 904 So. 2d 207, 2005 Miss. App. LEXIS 401 (Miss. Ct. App. 2005).

District court should have granted the motion for judgment notwithstanding the verdict of defendants, a state university and professors, regarding the applicability of the Mississippi Tort Claims Act in a doctoral student's action alleging that defendants' conduct prevented her from receiving her doctoral degree because although the student claimed that the action was in contract, clearly tort claims were before the jury, and the Act's statute of limitations had run. *Univ. of S. Miss. v. Williams*, 891 So. 2d 160, 2004 Miss. LEXIS 1357 (Miss. 2004).

5. Joinder.

Where a doctor working in partnership with a community hospital was sued for medical malpractice, he did nothing to assert immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., for five years until he moved for summary judgment; because he delayed and actively participated in discovery, he waived MTCA immunity. To be in compliance with the MTCA, plaintiff would have had to sue the partnership, joining the doctor under Miss. Code Ann. § 11-46-7(2) in his representative capacity only, and would have been required to provide ninety-day notice pursuant to Miss. Code Ann. § 11-46-11(1). *Estate of Grimes v. Warrington*, 982 So. 2d 365, 2008 Miss. LEXIS 101 (Miss. 2008).

6. Employee's criminal conduct.

A city was not liable for its police officers' sexual contact with a runaway child because the officers' conduct constituted a criminal offense, and under Miss. Code Ann. § 11-46-7(2), an employee is not considered to be acting within the course and scope of his employment and a governmental entity is not liable and is not considered to have waived immunity for any conduct of its employees if the employee's conduct constituted any criminal offense. *City of Jackson v. Sandifer*, 107 So. 3d 978, 2013 Miss. LEXIS 60 (Miss. 2013).

OPINIONS OF THE ATTORNEY GENERAL

Members of Foster Care Review Board enjoy public official immunity for any of their acts arising out of and within course and scope of their duties on the Board pursuant to Section 11-46-9 provided that conduct does not constitute fraud, malice, libel, slander, defamation or criminal offense. Tardy, Jan. 5, 1994, A.G. Op. #93-0972.

Under Section 11-46-7(3), a School District may not require that school district personnel who use their personal vehicles for travel in the course of their employment provide proof of liability insurance coverage on such vehicles. Sadler, February 9, 1995, A.G. Op. #95-0006.

Since Section 11-46-7 creates an exclusive remedy against the state for an employee's negligence, and clearly states that no employee shall be held personally liable for any judgments obtained in any action brought under the Mississippi Tort Claims Act, within the course and scope of his employment, then no state employee's insurer should ever be liable to a plaintiff for injuries sustained as a result of the employee's negligence, thereby obviating the need for the insurer to defend or pay any judgment or settlement. Hardy, February 16, 1996, A.G. Op. #96-0053.

Staff physicians under contract with the University of Mississippi Medical Center are employees of a governmental entity of the State of Mississippi, and the Medical Center is responsible for affording them a

defense and paying any judgment against them or settlement for any claim arising out of an act or omission within the course and scope of their employment, and within the limits of the Mississippi Tort Claims Act. Conerly, September 4, 1998, A.G. Op. #98-0500.

Doctors, nurses and pharmacists employed by the State Department of Health and acting within the scope and course of their employment are covered by the Tort Claims Act. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

A legal defense is provided to doctors, nurses and pharmacists employed by the State Department of Health even though the conduct is alleged to be outside the course and scope of their employment. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

There is no reason for a practitioner to obtain additional liability coverage as long as the acts are within the course and scope of his employment with the State Health Department. Amy, Jan. 17, 2003, A.G. Op. #02-0746.

In a situation in which a complainant files an action against an employer or employee for acts which the employer has determined to be outside the course and scope of the employee's duties for the employer, the employer may choose to seek a determination of that question by the court prior to declining to provide a defense for the employee. Banks, Feb. 17, 2006, A.G. Op. 06-0047.

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Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000).

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

§ 11-46-8. Foster parents covered under this chapter.

Mississippi Department of Human Services licensed foster parents shall

be covered under this chapter for claims made by parties other than the foster child which are based on inadequate supervision or inadequate care of the foster child on the part of the foster parent.

HISTORY: Laws, 1999, ch. 518, § 2, eff from and after July 1, 1999.

§ 11-46-9. Exemption of governmental entity from liability on claims based on specified circumstances.

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and

whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715, or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 65-43-1 or 65-43-3, where the act or omission occurs during the term of any such contract.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

- (a) Is inactive and dormant;
- (b) Receives no revenue;
- (c) Has no employees; and
- (d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

HISTORY: Laws, 1984, ch. 495, § 6; reenacted without change, 1985, ch. 474, § 5; Laws, 1987, ch. 483, § 5; Laws, 1993, ch. 476, § 4; Laws, 1994, ch. 334, § 1; Laws, 1995, ch. 483, § 1; Laws, 1996, ch. 538, § 1; Laws, 1997, ch. 512, § 2; Laws, 2007, ch. 582, § 21; brought forward without change, Laws, 2016, ch. 367, § 3, eff from and after July 1, 2016.

Editor's Notes — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

On July 18, 2007, the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, as amended and extended, to the amendment of this section by Laws of 2007, ch. 582, § 21.

Federal Aspects— Provisions of the National Guard Tort Claims Act, see 32 USCS § 715.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
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1. In general.

Inmate's claims against the Department of Corrections—for failure to release the inmate upon completion of the inmate's sentence—were barred by Miss. Code Ann. § 11-46-9(1)(m) because the inmate did not seek administrative or other relief during the three and a half months that the inmate claimed the inmate was unlawfully detained, and the inmate was unquestionably confined in the custody of the Department of Corrections when the inmate's claims arose. *Tillman v. Miss. Dep't of Corr.*, 95 So. 3d 716, 2012 Miss. App. LEXIS 479 (Miss. Ct. App. 2012).

Miss. Code Ann. § 11-46-9(1)(b) required the use of ordinary care when performing a statutory duty, and Miss. Code Ann. § 11-46-9(1)(d) had no requirement of ordinary care when the act was a discretionary function; the student was not harmed or injured at school, nor was she harmed or injured during the numerous times that she skipped school and walked off campus, instead, she was injured when her bus driver took her to his home, and the duty to hire and supervise employees was necessarily and logically dependent upon judgment and discretion, and this discretionary function did not require that the school district exercise ordinary care. *A.B. v. Stone County Sch. Dist.*, 14 So. 3d 794, 2009 Miss. App. LEXIS 488 (Miss. Ct. App. 2009).

Summary judgment was properly awarded to a county board of supervisors

in plaintiffs' action to recover damages for injuries sustained after their vehicle collided with a mailbox on the shoulder of a road because plaintiffs' evidence failed to establish that the county owned the property where the mailbox was located, as required for a claim under Miss. Code Ann. § 11-46-9(1)(v). *Bryant v. Bd. of Supervisors*, 10 So. 3d 919, 2008 Miss. App. LEXIS 595 (Miss. Ct. App. 2008).

In granting immunity from claims brought by an inmate, Miss. Code Ann. § 11-46-9(1)(m) does not distinguish between those lawfully and those unlawfully within the custody of the state. *Brooks v. Pennington*, 995 So. 2d 733, 2007 Miss. App. LEXIS 378 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

Construction project was executed by the independent contractor's employees, and appellants presented no evidence that the Mississippi Department of Transportation's (MDOT) employees committed any act or omission that led to the accident; the supreme court could not look to apply the immunity provisions of the Mississippi Tort Claims Act (MTCA) unless some wrong by the government was first established, and the requisite negligence could not be established. *Chisolm v. Miss. DOT*, 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Legal principle referred to as "Frasier's octopus" applies to an individual claim, but may or may not apply to all claims; therefore, summary judgment was improperly granted to a department of transportation on claims of negligent construction, negligent maintenance, negligent improvement, and failure to warn based on a finding of immunity under Miss. Code Ann. § 11-46-9(1)(p) on a defective design claim. *MacDonald v. Miss. DOT*, 955 So. 2d 355, 2006 Miss. App. LEXIS 682 (Miss. Ct. App. 2006), cert. denied, 2007 Miss. LEXIS 246 (Miss. Apr. 19, 2007).

County and deputy sheriff were immune from that arose out of a traffic collision when the deputy was on his way to have spare keys made for the county's gas pumps, which was deemed to be per-

formance of governmental duties, and the deputy did not act with reckless disregard of a risk. At worst, the deputy's action in pulling into an intersection was negligent. *Reynolds v. County of Wilkinson*, 936 So. 2d 395, 2006 Miss. App. LEXIS 245 (Miss. Ct. App. 2006).

In a case where a mental health patient suffered injuries due to a fall during an attempted escape, Miss. Code Ann. § 11-46-9(1)(m) did not shield a state department of mental health from liability because it only pertained to penal institutions. *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

In a case where a patient in a mental health facility was injured during an attempted escape, liability was not precluded under Miss. Code Ann. § 97-9-25 and Miss. Code Ann. § 11-46-9(1)(f) because an attempted escape by a mental patient was not a criminal act. *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

Miss. Code Ann. § 11-46-9(1) provided that any governmental entity and its employees who were acting within the scope of their employment were not liable for any claim unless the employee acted in reckless disregard of the safety and well-being of any person; therefore, because the driver had to show more than mere negligence to establish reckless disregard and there was no indication that the deputy acted with deliberate disregard for the safety of others when he hit her vehicle, the trial court properly granted the sheriff summary judgment in her lawsuit seeking to collect for injuries that she sustained in an accident with a sheriff's department vehicle. *Jackson v. Payne*, 922 So. 2d 48, 2006 Miss. App. LEXIS 137 (Miss. Ct. App. 2006).

County was not immune from its duty to properly maintain and repair the bridge and its duty to warn of a dangerous condition where the county had been on notice for five years that the bridge needed repair and was in danger of imminent collapse; the county had more than enough money to fix the bridge, without jeopardizing funds for other road and bridge projects. *Ladner v. Stone County*, 938 So. 2d 270, 2006 Miss. App. LEXIS 49

(Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

Driver could not maintain a dangerous condition cause of action against the State Aid defendants because there was no dispute that the bridge was a county road, not a state highway. *Ladner v. Stone County*, 938 So. 2d 270, 2006 Miss. App. LEXIS 49 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

Inmate's state claims were barred pursuant to Miss. Code Ann. § 11-46-9(m) because the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, specifically excluded claims arising under state law while a person was lawfully incarcerated in a penal facility. *Harvison v. Greene County Sheriff Dep't*, 899 So. 2d 922, 2005 Miss. App. LEXIS 214 (Miss. Ct. App. 2005).

Miss. Code Ann. § 11-46-9 did not provide immunity for a city that neglected to inspect or maintain a city ditch; a business was entitled to recover damages when, during a heavy rain, the ditch flooded, causing property damage. *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So. 2d 60, 2005 Miss. LEXIS 219 (Miss. 2005).

Officer didn't show malice in an arrest in which the arrestee allegedly suffered a sprained wrist, and was immune from liability. The district, as well, was immune from liability. *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So. 2d 1013, 2004 Miss. App. LEXIS 225 (Miss. Ct. App. 2004).

Inmate was an inmate of the county jail at the time of the incident in question and appellees were exempt from liability under Miss. Code Ann. § 11-46-9(1)(m); because a governmental entity was immune from all claims arising from claimants who were inmates at the time the claim arose, Miss. Code Ann. § 11-46-9(1)(m) of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., did not apply to sheriff's department employees. *Love v. Sunflower County Sheriff's Dep't*, 860 So. 2d 797, 2003 Miss. LEXIS 756 (Miss. 2003).

Miss. Code Ann. § 11-46-9(1)(m) clearly barred the parents' wrongful death suit against the county and individuals after

the death of their son while he was incarcerated in the county detention center; since § 11-46-9(1)(m) provided the decedent with no remedy, it also prevented a suit by the heirs, and the parents were unable to bring a wrongful death suit on behalf of a prisoner who died while incarcerated. *Webb v. DeSoto County*, 843 So. 2d 682, 2003 Miss. LEXIS 186 (Miss. 2003).

Legislature expressly stated the governmental entity would be immune from all liability from any claim of any claimant who was an inmate at the time the claim arose; an inmate remained an inmate while being transported, while participating in public service work programs or while on leave if a pass was granted. *Wallace v. Town of Raleigh*, 815 So. 2d 1203, 2002 Miss. LEXIS 169 (Miss. 2002).

After witnessing the deceased's commission of several criminal offenses, which were more than misdemeanors, the officers were empowered to stop and arrest him as there was a causal nexus between the deceased's criminal activity and the actions of the officers. *Tory v. City of Edwards*, 829 So. 2d 1246, 2002 Miss. App. LEXIS 395 (Miss. Ct. App. 2002).

Miss. Code Ann. § 11-46-9(1)(m) preserves the government's sovereign immunity with regard to the claims of jail inmates. *Liggans v. Coahoma County Sheriff's Dep't*, 823 So. 2d 1152, 2002 Miss. LEXIS 248 (Miss. 2002).

Tort Claims Act was the exclusive route for filing suit against a governmental entity and its employees; governmental entity and its employees acting within the course and scope of their employment were free of liability for a claim based upon any of the acts or omissions enumerated therein. *City of Jackson v. Sutton*, 797 So. 2d 977, 2001 Miss. LEXIS 259 (Miss. 2001).

Governor was not protected by sovereign immunity from resident's action to compel public hearing pursuant to Administrative Procedures Law (APL) before submitting Capacity Assurance Plan (CAP) to federal Environmental Protection Agency (EPA). *USPCI of Mississippi v. State ex rel. McGowan*, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

Under § 83-11-101(1), uninsured motorist (UM) carrier was entitled to assert

city's defense of sovereign immunity (§ 11-46-9) in connection with collision between fire truck and insured; insured's statutory right to UM benefits is limited to instances in which insured would be entitled, at time of injury, to recover through legal action. *Coleman v. American Mfrs. Mut. Ins. Co.*, 930 F. Supp. 255, 1996 U.S. Dist. LEXIS 8961 (N.D. Miss. 1996).

Decision to replace bridge with culvert on county road was discretionary function to which qualified immunity attached in personal injury action brought by motorist. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

Evidence did not establish breach of ministerial duty on part of county supervisors in their individual capacities in connection with replacement of bridge with culvert on county road; while statute required culverts to be not less than full width of crown of roadway and to have guide or warning posts on either side, there was no evidence that such minimum standards were not met. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

While decision to replace bridge with culvert on county road was discretionary one to which qualified immunity attached, fact issue existed as to whether county supervisor who determined that replacement was necessary, determined size of culvert needed, and supervised installation of culvert substantially exceeded his authority or was so grossly negligent that his action could be described as constructively intentional such that he was deprived of immunity, precluding summary judgment for supervisor on motorist's personal injury claim. *Mohundro v. Alcorn County*, 675 So. 2d 848, 1996 Miss. LEXIS 301 (Miss. 1996).

Sovereign immunity cloaks all "governmental functions" a city performs. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

"Governmental functions," which are cloaked with sovereign immunity, are those functions which a city is required to undertake. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Operation of fire department, including the supply of water to combat fires, is a

governmental function, cloaked by sovereign immunity, even if the same supply provides drinking water, which is proprietary activity. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

City could not lose sovereign immunity for fire protection service in annexed area through negligence per se, where annexation ordinance did not require specific placement of water lines or mains in a certain point. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Governmental officers are immune from personal liability for fire protection decisions if the decision to provide water lines, or certain aspects of fire protection to property, is a discretionary matter involving public policy decisions. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Provision of water lines, under annexation ordinance providing for installment of water lines "when necessary and economically feasible," was discretionary decision, for which city officials were entitled to qualified immunity. *Westbrook v. City of Jackson*, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

A city's operation of a service garage and towing service for its vehicles was a proprietary function, and therefore the defense of sovereign immunity was not available in a wrongful death action against the city arising from a collision between the deceased's car and a city tow truck. *Thomas v. Hilburn*, 654 So. 2d 898, 1995 Miss. LEXIS 230 (Miss. 1995).

For purposes of governmental immunity, the statutory framework for reporting cases of suspected child abuse includes elements of both ministerial and discretionary conduct; § 43-21-353 first requires a person to make a determination of whether "reasonable cause" exists as a foundation for an incident report, which involves a duty to investigate a ministerial duty and a decision as to whether reasonable cause exists a decision involving the exercise of personal judgment and discretion; if a determination is made that there is reasonable cause to report the incident, the statute then mandates that an immediate oral report be issued to the

Department of Human Services an action involving no discretion. *T.M. v. Noblitt*, 650 So. 2d 1340, 1995 Miss. LEXIS 15 (Miss. 1995).

When the State is sued to determine whether a state statute or action is unconstitutional, the State cannot be held liable for damages if the conduct falls within one of the exceptions found in § 11-46-9. *State v. Hinds County Bd. of Supervisors*, 635 So. 2d 839, 1994 Miss. LEXIS 163 (Miss. 1994).

A county's action seeking a determination of whether § 47-5-112 [Repealed] violated any constitutional rights enjoyed by the county was not barred, since there is no sovereign immunity when the relief sought is a declaration that a particular statute or action of the State is unconstitutional. *State v. Hinds County Bd. of Supervisors*, 635 So. 2d 839, 1994 Miss. LEXIS 163 (Miss. 1994).

Sheriff's deputies who obtained a search warrant were shielded from liability by qualified immunity since the action of obtaining the search warrant was discretionary rather than ministerial. *Barrett v. Miller*, 599 So. 2d 559, 1992 Miss. LEXIS 201 (Miss. 1992).

Sheriff deputies were not exercising discretionary authority in searching a home where the deputies were acting under a search warrant which gave them the authority to search and set out the parameters in which the search should be carried out; the execution of the search warrant was a ministerial act and required no discretionary decision making, aside from the places in the house to be searched, on the part of the deputies executing the warrant, and therefore the deputies who executed it were not shielded from liability by qualified immunity. *Barrett v. Miller*, 599 So. 2d 559, 1992 Miss. LEXIS 201 (Miss. 1992).

A sheriff's duties with respect to operating a jail and keeping prisoners confined were discretionary in nature and, therefore, the sheriff was entitled to the protection of qualified immunity in a suit to recover for the wrongful death of a victim who was murdered by escaped inmates. *McQueen v. Williams*, 587 So. 2d 918, 1991 Miss. LEXIS 715 (Miss. 1991), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Any liability on the part of the Mississippi State Highway Commission for a breach of its implied warranty that plans and specifications to a contractor for resurfacing would provide a reasonably safe highway, was premised upon a tort liability arising from negligently defective plans and specifications, rather than any contractual obligation, and therefore the Commission was immune from suit. *Employers Ins. of Wausau v. Mississippi State Highway Com.*, 575 So. 2d 999, 1990 Miss. LEXIS 894 (Miss. 1990), cert. denied, 502 U.S. 817, 112 S. Ct. 72, 116 L. Ed. 2d 46, 1991 U.S. LEXIS 4432 (U.S. 1991).

The governor's duties under § 47-5-93 and § 7-1-5(c) and (d) are discretionary and, as such, the governor enjoys a qualified immunity to a civil suit for damages based on the governor's alleged failure to perform his duties under those statutes. *McFadden v. State*, 542 So. 2d 871, 1989 Miss. LEXIS 65 (Miss. 1989).

Although ordinarily private individual may not maintain suit against school district to enforce zoning ordinance or to enjoin what is in essence public nuisance created by construction of school building, where construction of school building in violation of municipal offstreet parking ordinance would obstruct abutting landowner's right of ingress and egress, landowner may obtain injunction against construction of building unless and until school district complies with parking ordinance. *Robinson v. Indianola Municipal Separate School Dist.*, 467 So. 2d 911, 1985 Miss. LEXIS 1973 (Miss. 1985).

2. Construction with other laws.

Trial court applied the correct legal standard and did not err when it found a city was immune from liability because a police officer did cause a rear-end collision, but his conduct simply did not rise to the level of reckless disregard, and thus, the city was entitled to immunity; a driver did not present any evidence indicating that the officer was reckless in the operation of his vehicle or acted with willful or wanton conduct, which resulted in the accident. *Carothers v. City of Water Valley*, 242 So. 3d 138, 2017 Miss. App. LEXIS 281 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 206 (Miss. 2018).

Statute governs suits against governmental entities, and, therefore, Miss. Code Ann. § 63-3-205 neither controls nor affects a municipality's grant of immunity pursuant to the Mississippi Tort Claims Act (MTCA); the statutory language of § 63-3-205 is unambiguous and serves as general guidelines for traffic regulations and rules of the road, and the language neither instructs nor implies that § 63-3-205 should be read in conjunction with the provisions of the MTCA. *Carothers v. City of Water Valley*, 242 So. 3d 138, 2017 Miss. App. LEXIS 281 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 206 (Miss. 2018).

Trial court did not err in failing to find that a police officer committed a traffic violation by tailgating a driver's vehicle because the driver had to show more than mere negligence to establish reckless disregard and remove a city's immunity; Miss. Code Ann. § 63-3-619 applies to traffic regulations but does not address governmental immunity. *Carothers v. City of Water Valley*, 242 So. 3d 138, 2017 Miss. App. LEXIS 281 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 206 (Miss. 2018).

Statute mandates the tax collector to act and positively imposes upon the tax collector the duty to file the tax-sale list with the chancery clerk; because there is no element of choice or judgment, the duty is ministerial, and the Mississippi Tort Claims Act affords no immunity. *Booneville Collision Repair, Inc. v. City of Booneville*, 152 So. 3d 265, 2014 Miss. LEXIS 582 (Miss. 2014).

Mississippi Tort Claims Act (MTCA) did not provide a city and its tax collector with immunity from suit on a purchaser's negligence claim; because the overarching purpose of filing the tax-sale list is to provide notice, and the tax collector's failure to file the tax-sale list does not arise out of the assessment or collection of any tax or fee under the MTCA. *Booneville Collision Repair, Inc. v. City of Booneville*, 152 So. 3d 265, 2014 Miss. LEXIS 582 (Miss. 2014).

Property owners' negligence suit fell within the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, because it was a claim against

state agencies, but because Miss. Code Ann. § 11-46-9(1)(f) of the MTCA and Miss. Code Ann. § 33-15-21 of the Mississippi Emergency Management Law (MEML), Miss. Code Ann. §§ 33-15-1 to 33-15-53, working together, the Mississippi Port Authority and Mississippi Development Authority were immune from liability stemming from emergency management activities; accordingly, the MTCA had not superseded the MEML as the two could be read in harmony. *Parsons v. Miss. State Port Auth. at Gulfport*, 996 So. 2d 165, 2008 Miss. App. LEXIS 705 (Miss. Ct. App. 2008).

While Miss. Code Ann. § 11-7-13 allows wrongful death beneficiaries to maintain an action to recover damages as would the decedent if death had not ensued, the action is derivative and the beneficiaries stand in the position of their decedent; thus, where the decedent was a prison inmate who could not have filed an action against the Mississippi Department of Corrections or a prison superintendent because of the immunity granted in Miss. Code Ann. § 11-46-9(1)(m), his wrongful death beneficiaries could not maintain a wrongful death action against those defendants. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187, 2003 Miss. LEXIS 655 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392 (U.S. 2004).

The purchase of liability insurance by a governmental entity under § 11-46-17(4) does not limit the exclusions or exemptions enumerated in this section. *Leslie v. City of Biloxi*, 758 So. 2d 430, 2000 Miss. LEXIS 87 (Miss. 2000).

3. Constitutionality.

The Remedy Clause, Miss. Const. art. 3, § 24, does not conflict with sovereign immunity, does not require exceptions to sovereign immunity, and does not grant an absolute guarantee of a trial; thus, no violation of the Remedy Clause occurred when plaintiff's action against the Mississippi Department of Corrections and a prison official for the wrongful death of an inmate was dismissed based on the immunity granted in Miss. Code Ann. § 11-46-9(1)(m). *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187, 2003 Miss. LEXIS 655 (Miss.

2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392 (U.S. 2004).

Sovereign immunity does not violate due process; such a violation requires the infringement of a liberty or property right and as the right to sue the State has been withheld by the Mississippi Legislature, the denial of the right to sue the State or other governmental entities or employees under Miss. Code Ann. § 11-46-9(1)(m) does not infringe upon any property right and does not violate due process. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187, 2003 Miss. LEXIS 655 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392 (U.S. 2004).

Miss. Code Ann. § 11-46-9(1)(m), which denies inmates the right to bring claims against the State or other governmental entities, does not violate the Equal Protection clause of the Fourteenth Amendment because there is a legitimate purpose in protecting governmental entities from claims brought by inmates. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187, 2003 Miss. LEXIS 655 (Miss. 2003), cert. denied, 541 U.S. 959, 124 S. Ct. 1714, 158 L. Ed. 2d 399, 2004 U.S. LEXIS 2392 (U.S. 2004).

Subsection (1)(d) of this section does not violate either the fourteenth amendment of the U.S. Constitution or the Remedy Clause of the Mississippi Constitution, Article 3, Section 24, which guarantees that individuals shall have access to courts to redress their injuries. *Jones v. Mississippi DOT*, 744 So. 2d 256, 1999 Miss. LEXIS 201 (Miss. 1999).

4. Absence, condition, malfunction, or removal by third parties of sign, signal, warning device, etc.

Where a state transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because road repairs were discretionary functions, the state did not waive its immunity by failing to warn of the dangerous condition because the risk of hydroplaning after

inclement weather was an open and obvious danger to one exercising due care. *Lee v. Miss. DOT*, 37 So. 3d 73, 2009 Miss. App. LEXIS 604 (Miss. Ct. App. 2009), cert. dismissed, 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Placement of a warning sign at a culvert is considered a ministerial function, as set forth in Miss. Code Ann. § 65-21-1. *Barr v. Hancock County*, 950 So. 2d 254, 2007 Miss. App. LEXIS 109 (Miss. Ct. App. 2007).

Miss. Code Ann. § 11-46-9 and the corresponding case law make it clear that a governmental entity is immune from claims arising from a non-obvious dangerous condition on government property, or failure to warn of the dangerous condition, absent actual or constructive notice of the dangerous condition. *Jones v. Miss. Transp. Comm'n*, 920 So. 2d 516, 2006 Miss. App. LEXIS 69 (Miss. Ct. App. 2006).

Summary judgment was properly awarded to a county in a wrongful death action filed by a driver's beneficiaries under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(v), because the beneficiaries failed to present any evidence that the accumulation of excess gravel on roads constituted a dangerous condition. *Lowery v. Harrison County Bd. of Supervisors*, 891 So. 2d 264, 2004 Miss. App. LEXIS 1003 (Miss. Ct. App. 2004).

Miss. Code Ann. § 11-46-9(1)(w) does not require a governmental entity to actively patrol areas containing warning signs to see if a third party has removed the signs. The statute exempts the governmental entity from liability for the removal of warning signs unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. *Mitchell v. City of Greenville*, 846 So. 2d 1028, 2003 Miss. LEXIS 259 (Miss. 2003).

Where precautions were taken to warn motorists of the dangerous road condition, the city was not required to actively patrol areas containing warning signs to see if a third party removed the signs, and no

evidence was presented to indicate that the city knew or should have known that the sign was blown or tipped over; therefore, the city was entitled to immunity from suit and entitled to summary judgment. *Mitchell v. City of Greenville*, 846 So. 2d 1028, 2003 Miss. LEXIS 259 (Miss. 2003).

In a citizen's negligence suit against the city for injuries she sustained when she fell at a construction site that had no warning devices, the city was not immune under Miss. Code Ann. § 11-46-9(v), (w) because the condition was not obvious and readily apparent. *City of Newton v. Lofton*, 840 So. 2d 833, 2003 Miss. App. LEXIS 227 (Miss. Ct. App. 2003).

Subsection (1)(a) did not require the grant of summary judgment to the defendant county in an action arising from a single vehicle accident where the plaintiffs alleged that the county was negligent in its failure to warn of the danger at the curve because there were no advisory speed limits, warning signs or other devices at the curve where the accident occurred; the plaintiffs did not assert claims relating to legislative, judicial or administrative action or inaction and, instead, complained about an alleged dangerous condition about which there was a failure to warn and questioned whether the county had exercised ordinary care. *Leflore County v. Givens*, 754 So. 2d 1223, 2000 Miss. LEXIS 12 (Miss. 2000), overruled in part, *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

In light of the plain language of subsection (1)(b), which makes qualified sovereign immunity contingent on the exercise of ordinary care, a county was not entitled to summary judgment in an action arising from a single vehicle accident where the plaintiffs alleged that the county was negligent in its failure to warn of a dangerous curve. *Leflore County v. Givens*, 754 So. 2d 1223, 2000 Miss. LEXIS 12 (Miss. 2000), overruled in part, *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So.

3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Subsection (1)(p) did not require the grant of summary judgment to the defendant county in an action arising from a single vehicle accident where the plaintiffs did not assert claims relating to the design, plan or construction of the road at issue and, instead, complained about an alleged dangerous condition about which there was a failure to warn and questioned whether the county had exercised ordinary care. *Leflore County v. Givens*, 754 So. 2d 1223, 2000 Miss. LEXIS 12 (Miss. 2000), overruled in part, *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Subsection (1)(e) did not require the grant of summary judgment to the defendant county in an action arising from a single vehicle accident where the plaintiffs did not assert claims relating to the adoption, or failure to adopt, a statute, ordinance or regulation and, instead, complained about an alleged dangerous condition about which there was a failure to warn and questioned whether the county had exercised ordinary care. *Leflore County v. Givens*, 754 So. 2d 1223, 2000 Miss. LEXIS 12 (Miss. 2000), overruled in part, *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Subsection (1)(w) of this section is an extension of an exemption subsumed in subsection (1)(d) of this section, as opposed to the establishment of a new exemption. *Jones v. Mississippi DOT*, 744 So. 2d 256, 1999 Miss. LEXIS 201 (Miss. 1999).

5. Adequate governmental services.

In promoting a fund-raising event to raise funds for a state school serving people who suffered from mental retardation, the Mississippi Department of Mental Health (MDMH) was immune from tort liability under Miss. Code Ann. § 11-46-9 of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23,

for a patron's negligence action after the patron fell down steps; the MDMH's promotion involved social and economic policy decisions, and was a discretionary function that qualified for immunity. *Miss. Dep't of Mental Health & Ellisville State Sch. v. Shaw*, 45 So. 3d 656, 2010 Miss. LEXIS 537 (Miss. 2010).

City was immune to a homeowner's claim of negligence in which he claimed that the city's negligent maintenance of his dirt road had caused damage to his wife physically and to his vehicles because: (1) the claim arose from an injury which resulted solely from the effect rain had on the road, and (2) even if one concluded that the city had a duty to purchase its own grading equipment, that was a discretionary decision for which the city had immunity under the act. *Schepens v. City of Long Beach*, 924 So. 2d 620, 2006 Miss. App. LEXIS 187 (Miss. Ct. App. 2006).

While subsection (1)(g) of this section provides that a school district is immune for certain policy decisions, such as how much money to allocate, it does not immunize a school district for failure to fulfill its statutory obligations; a school board is required by § 37-7-301(d) to erect, repair, and equip school facilities as well as maintain, control, and care for the same, and subsection (1)(g) of this section provides a school district and its employees with protection from liability while performing or failing to perform such statutory duties so long as ordinary care is exercised. *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1999 Miss. LEXIS 167 (Miss. 1999).

6. Discretionary functions.

Because the widower's allegations concerning the design of the city's ballpark, including lighting, gates, and safe ingress and egress to the park, as well as the proper hiring, training, and supervision of employees and the adoption of safety protocols for use of the park by the public were discretionary functions, the trial court properly dismissed those claims pleaded by the widower in his wrongful death action. *Shutze v. City of Pearl*, — So. 3d —, 2019 Miss. App. LEXIS 359 (Miss. Ct. App. July 30, 2019).

Because the widower's allegations of negligently leaving the gate unsecured, failing to maintain the gate, and failing to inspect fixtures upon the property that could create a dangerous condition were not exempt under the public-policy function test of discretionary immunity, the trial court erred by dismissing those claims. *Shutze v. City of Pearl*, — So. 3d —, 2019 Miss. App. LEXIS 359 (Miss. Ct. App. July 30, 2019).

City was entitled to summary judgment on a driver's claims that it acted negligently in training a police officer and entrusting him with one of its police vehicles because the driver sought to hold the city liable for its exercise of a discretionary function, actions that were clearly immune under subsection (1)(d). *City of Clinton v. Tornes*, 252 So. 3d 34, 2018 Miss. LEXIS 371 (Miss. 2018).

Circuit court erred in granting the motions filed by a county board of supervisors and a city to dismiss a driver's personal injury action based on discretionary-function immunity because the driver alleged a simple act of negligence, where the allegedly tortious act was a construction crew's alleged failure to barricade or warn against the significant drop-off in the road—a condition it created—and not the result of statutory noncompliance or the result of a policy decision. *Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 2018 Miss. LEXIS 229 (Miss. 2018).

Circuit court properly granted a city's motion for summary judgment in an invitee's personal injury action because the city was entitled to discretionary-function immunity where both the governmental function—the city's ownership and holding of the premises at issue—and the activity at issue in furtherance of that function—mowing and maintaining the lawn—were discretionary, and none of the statutes cited by the invitee required or imposed an affirmative duty on the city to purchase, maintain, care, or control the property. *Lowe v. City of Moss Point*, 243 So. 3d 753, 2017 Miss. App. LEXIS 587 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 69, 2018 Miss. LEXIS 214 (Miss. 2018).

Trial court properly granted a county convention and visitors bureau summary judgment in a visitor's action alleging that

the bureau failed to maintain a civic center's grassy area in a safe condition because the bureau's operation of the civic center was a discretionary function to which immunity attached; by owning and using the civic center, the bureau engaged in a function Miss. Code Ann. § 17-3-29(4) authorized but did not require. *Crider v. DeSoto Cnty. Convention*, 201 So. 3d 1063, 2016 Miss. LEXIS 322 (Miss. 2016).

Circuit court properly granted summary judgment in favor of a school district in a parent's wrongful-death action because the district was immune from the parent's claims, the district's oversight of a school parking lot—where the decedent, who was riding on the trunk of a car, fell and struck her head on the parking-lot pavement—was discretionary, not ministerial. *Davis v. Jones County Sch. Dist.*, 193 So. 3d 653, 2015 Miss. App. LEXIS 632 (Miss. Ct. App. 2015).

Student's action against a school district for failure to oversee student conduct and school safety was remanded to the trial court for the parties to present evidence in light of the new standard for determining the application of discretionary-function immunity in *Brantley v. City of Horne Lake*, 152 So. 3d 1106 (Miss. 2014) where the school district did not waive immunity through active participation in the litigation and discovery was necessary to determine whether the school district enjoyed the right to discretionary-function immunity. *Doe v. Rankin Cnty. Sch. Dist.*, 189 So. 3d 616, 2015 Miss. LEXIS 552 (Miss. 2015).

Because the Supreme Court of Mississippi's rules for determining discretionary-function immunity under Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2012) had changed drastically during the pendency of the litigation, the interests of justice demanded that the instant case be remanded for the parties to present evidence and arguments in light of the new *Brantley* test. *City of Magee v. Jones*, 161 So. 3d 1047, 2015 Miss. LEXIS 190 (Miss. 2015).

Duty to maintain a sewage system is not imposed by law upon municipalities; the language of the statute explicitly leaves it to the discretion of municipalities whether and how to maintain their sew-

age systems, if any, and accordingly, sewage maintenance, as a general function, is discretionary. *Boroujerdi v. City of Starkville*, 158 So. 3d 1106, 2015 Miss. LEXIS 84 (Miss. 2015).

Miss. Code Ann. § 63-3-303 (Rev. 2013) allowed the Mississippi Department of Transportation, in its discretion, to determine the appropriate type, number, and location of traffic-control devices, making it immune from liability for a claim of failure to erect or maintain appropriate and reasonable signs, signals, warning devices, illumination devices, or guardrails and/or barriers despite actual or constructive notice of the absence and/or inadequate condition of the existing devices under Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2012). *Ala. Great S. R.R. Co. v. Jobes*, 156 So. 3d 871, 2015 Miss. LEXIS 37 (Miss. 2015).

Miss. Code Ann. § 65-1-175(3) allowed the Mississippi Department of Transportation, in its discretion, to determine the appropriate type, number, and location of protective devices at railroad crossings, making it immune from liability for failing to provide an adequate clear zone or shoulder or adequate and necessary crash cushions under Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2012). *Ala. Great S. R.R. Co. v. Jobes*, 156 So. 3d 871, 2015 Miss. LEXIS 37 (Miss. 2015).

Because the act of maintaining or repairing the apartments – or failing to maintain or repair – fell under the housing authority's duty to provide its residents a safe dwelling, it could not be said the decision to not repair or replace a light fixture was the exercise of a discretionary function; however, the housing authority was entitled to sovereign immunity because it had no actual or constructive notice of the dangerous condition of the light fixture before it fell on the tenant. *Serrano v. Laurel Hous. Auth.*, 151 So. 3d 256, 2014 Miss. App. LEXIS 661 (Miss. Ct. App. 2014).

Employee of a state administrative agency was not personally liable when a claimant alleged that the employee falsely imprisoned the claimant in the lobby of a state office building because the employee was immune from personal liability, under Miss. Code Ann. § 11-46-7(2), in that,

at all relevant times, the employee was acting within the course and scope of the employee's employment and was entitled to discretionary immunity, under Miss. Code Ann. § 11-46-9(1)(d). *Bell v. Miss. Dep't of Human Servs.*, 126 So. 3d 999, 2013 Miss. App. LEXIS 826 (Miss. Ct. App. 2013).

School district was immune from liability regarding a student's tort claims because the decision by the school district's employees to deny the student permission to go to a rest room during a test was a discretionary function subject to immunity. *Harris v. Bd. of Trustees of the Clinton Public Sch. Dist.*, 126 So. 3d 100, 2013 Miss. App. LEXIS 762 (Miss. Ct. App. 2013).

Although a county pleaded the affirmative defense of immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., in its answer to a negligence action, the county waived the defense because the county actively participated in the litigation and the county's two-year-and-four-month delay in pursuing the affirmative defense of immunity under Miss. Code Ann. § 11-46-9(1)(d) was unreasonable and unnecessary. *Alexander v. Newton County*, 124 So. 3d 688, 2013 Miss. App. LEXIS 197 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 565 (Miss. 2013).

Mississippi Department of Transportation (MDOT) was immune from suit under Miss. Code Ann. § 11-46-9(1)(d) as Miss. Code Ann. § 65-1-65 did not impose any specific directives as to the time, manner, and conditions for carrying out MDOT's duty to maintain highways, and the duty to remove trees from the right-of-way was discretionary; MDOT was not liable for the driver's injuries arising out of road maintenance. *Little v. Miss. DOT*, 129 So. 3d 192, 2012 Miss. App. LEXIS 627 (Miss. Ct. App. 2012), rev'd, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Evidence supported the conclusion that the city's refusal to extend new water service to the subdivision was based upon a perceived lack of adequate fire flow pressure in the water line, and although that perception turned out to be incorrect, even if the city's conduct rose to the level of negligence, that did not amount to an

abuse of discretion, nor did it show that the city's decision to deny new water service was arbitrary and capricious. The developer's evidence was insufficient to overcome the city's entitlement to immunity under Miss. Code Ann. §§ 11-46-9(1)(d), (g), and (h). *L&F Homes & Dev., LLC v. City of Gulfport*, 2012 U.S. Dist. LEXIS 100855 (S.D. Miss. July 20, 2012), *aff'd*, 538 Fed. Appx. 395, 2013 U.S. App. LEXIS 16452 (5th Cir. Miss. 2013).

City was not liable for its alleged failure to properly investigate a runaway child's claim that she had sex with a police officer, as the manner in which its police department supervised, disciplined, and regulated its officers was a discretionary function; thus, the city was immune from suit under Miss. Code Ann. § 11-46-9(1)(d). *City of Jackson v. Sandifer*, 107 So. 3d 978, 2013 Miss. LEXIS 60 (Miss. 2013).

In a premises liability action for injuries a claimant sustained when the claimant was trampled by a cow, the Mississippi Fairgrounds Commission was immune from liability under the discretionary-function exemption at Miss. Code Ann. § 11-46-9(1)(d) of the Mississippi Tort Claims Act; the livestock show furthered important social, economic and political policies. *Wiltshire v. Miss. Fairgrounds Comm'n*, 75 So. 3d 563, 2011 Miss. App. LEXIS 184 (Miss. Ct. App.), *cert. denied*, 73 So. 3d 1168, 2011 Miss. LEXIS 549 (Miss. 2011).

Trial court erred in granting a city summary judgment in landowners' action to recover for the damages they sustained when raw sewage flooded their homes due to blockage in the city's sewage lines because a genuine issue of material fact existed as to whether the city violated a ministerial duty that it articulated and imposed on itself in a subdivision ordinance as to minimum-design standards and sewage pipe size; the record reflected evidence that the city breached a ministerial duty set forth in its own ordinance that contained no element of choice. *Fortenberry v. City of Jackson*, 71 So. 3d 1211, 2010 Miss. App. LEXIS 76 (Miss. Ct. App. 2010), *rev'd*, 71 So. 3d 1196, 2011 Miss. LEXIS 88 (Miss. 2011).

Circuit court erred in denying a school district's motion for summary judgment

as to a mother's negligence claim because the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d), operated to shield the district and its coaches and employees from any liability for the death of her son, who allegedly suffered from heat stroke during football practice, since nothing in the record indicated that the district and/or the football coaches, or any district employee or staff member, violated any statute, ordinance, or regulation concerning conducting football practice, and the conduct at issue constituted discretionary behavior; the district's discretionary decision to allow coaches the ability to set and conduct practices was rooted in policy because coaches know their players and had to be able to control their teams. *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 2010 Miss. LEXIS 45 (Miss. 2010).

State transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because highway repairs were discretionary functions. *Lee v. Miss. DOT*, 37 So. 3d 73, 2009 Miss. App. LEXIS 604 (Miss. Ct. App. 2009), *cert. dismissed*, 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010), *overruled*, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

School district was immune from suit with regard to a minor's action seeking to recover damages after he fell from the bed of a pickup truck while being transported by another student to football practice based on the discretionary function exemption of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d). *Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187, 2009 Miss. App. LEXIS 240 (Miss. Ct. App. 2009).

Mississippi Transportation Commission was immune from liability under Miss. Code Ann. § 11-46-9(1)(d) in a wrongful death suit alleging negligent highway maintenance and negligence in failing to install necessary traffic control devices because decisions regarding the maintenance and repair of highways and the placement of traffic control devices were

discretionary matters entrusted to public officials. Because such decisions involved discretionary functions and not ministerial adherence to established policy or protocol, the discretionary decisions were subject to immunity under the Mississippi Tort Claims Act. *Knight v. Miss. Transp. Comm'n*, 10 So. 3d 962, 2009 Miss. App. LEXIS 217 (Miss. Ct. App. 2009), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Order granting summary judgment in favor of a county's board of supervisors with regard to a properly owner's action for damage to his timberland was affirmed because the board was immune under Miss. Code Ann. § 11-16-9(1)(d). While Miss. Code Ann. § 65-21-1 set the minimum length for a culvert, it did not make the sizing and installation of a culvert ministerial; therefore, such functions were entitled to immunity under Miss. Code Ann. § 11-46-9(1)(d) as a discretionary function. *Fisher v. Lauderdale County Bd. of Supervisors*, 7 So. 3d 968, 2009 Miss. App. LEXIS 175 (Miss. Ct. App. 2009).

In action brought by a husband and wife against defendants, a city, its mayor, the chief of police, and police officers, pursuant to 42 U.S.C.S. § 1983 and state law, the court denied defendants' motion to dismiss because the police protection and discretionary function exemptions to waiver of immunity under Miss. Code Ann. § 11-46-9(1)(c), (d) did not apply; the husband was not engaged in criminal activity at the time of his arrest, so the issue regarding the applicability of § 11-46-9(1)(c) was whether the officers acted in reckless disregard of the husband's safety or well being, and it could not be said that the officers' actions, as identified in plaintiffs' allegations of excessive force and wrongful arrest, fell within the exemption, and if, as the husband alleged, the officers had no arguable basis for concluding they had probable cause to arrest the husband, it would seem that they had no discretion to arrest him, and in no event did the officers have discretion to use excessive force against him. *McGregory v. City of Jackson*, 504 F. Supp. 2d 143, 2007 U.S. Dist. LEXIS 60313 (S.D. Miss. 2007).

In an action brought by plaintiff against defendants, a city, its mayor, the chief of

police, and a police officer, pursuant to 42 U.S.C.S. § 1983 and state law, asserting claims of excessive force, false arrest and false imprisonment, and various other state tort claims, the court granted defendants' motion to dismiss for immunity pursuant to Fed. R. Civ. P. 12(b)(6) because Miss. Code Ann. § 11-46-9(1)(c), (d) did not provide exceptions to the Mississippi Tort Claims Act (MTCA) waiver of immunity for plaintiffs' claims, as the court was unable to conclude on the basis of the facts alleged by plaintiff that defendants were immune under the MTCA. *Spencer v. City of Jackson*, 511 F. Supp. 2d 671, 2007 U.S. Dist. LEXIS 55630 (S.D. Miss. 2007).

After learning of the former professor's affair with a student at a university where he previously taught, the decision of the former president of the university and the former vice-president of academic affairs to recommend the professor for only a one-year position necessarily involved an act of choice or judgment, as by nature the president's and vice-president's administrative positions at the university required them to make those types of choices and judgments regarding the faculty, and Miss. Code Ann. § 37-101-15(f) provided that the executive head of the university nominate for election all subordinate employees of the university; nothing in the statute limited the discretion of the president and thus the action by the president and vice-president recommending the professor for one year's employment instead of tenure-track, after learning of the affair with the student, was a discretionary act immune from suit under Miss. Code Ann. § 11-46-9(1)(d). *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158, 2007 Miss. App. LEXIS 492 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 150 (Miss. 2008).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were enforcing a facially valid Virginia custody order granting custody of children to the children's mother, it arose out of a judicial action; thus, immunity under Miss. Code Ann. § 11-46-9(1)(a) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake*

v. Wilson, 962 So. 2d 705, 2007 Miss. App. LEXIS 252 (Miss. Ct. App. 2007).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were enforcing a facially valid Virginia custody order granting custody of children to the children's mother, they acted with discretion and were forced to make choices that involved social, economical, or political policy alternatives; thus, immunity under Miss. Code Ann. § 11-46-9(1)(d) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705, 2007 Miss. App. LEXIS 252 (Miss. Ct. App. 2007).

Miss. Code Ann. § 65-21-1 plainly states that certain construction requirements must be met once a governmental entity determines that a culvert is needed; it only sets forth the minimum requirements to be met with regard to the construction of culverts, and any decisions made outside of those minimum requirements are discretionary functions of government. *Barr v. Hancock County*, 950 So. 2d 254, 2007 Miss. App. LEXIS 109 (Miss. Ct. App. 2007).

Finding against the student in her action against a state university and a professor after she suffered a third-degree burn at an iron pour demonstration was improper under Miss. Code Ann. § 11-46-9(1)(d) because the university was not protected by discretionary function immunity and was liable for the professor's negligence pursuant to the waiver of sovereign immunity codified at Miss. Code Ann. § 11-46-5; it was difficult to fathom how the professor's failure to put down dry sand before the pour involved a policy judgment of a social, political, or economic nature. *Pritchard v. Von Houten*, 960 So. 2d 568, 2007 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 391 (Miss. 2007).

Summary judgment was properly awarded to the Mississippi Transportation Commission (MTC) in appellants' action for injuries and death resulting from a two-vehicle collision because the MTC's duty to place warning signs was discretionary under Miss. Code Ann. § 63-3-303; hence, the MTC's failure to place

warning signs was shielded from liability according to Miss. Code Ann. § 11-46-9(1)(d). *Willingham v. Miss. Transp. Comm'n*, 944 So. 2d 949, 2006 Miss. App. LEXIS 916 (Miss. Ct. App. 2006).

State hospital was entitled to immunity from tort liability pursuant to Miss. Code Ann. § 41-4-7(g) because the hospital was acting in a discretionary manner when it made placement decisions for the patient and allowed the patient to participate in a day program where the patient suffered an injury; the decisions were a matter of social policy and the hospital and its employees were thus immune from tort liability in a lawsuit filed by the patient. *Dancy v. East Miss. State Hosp.*, 944 So. 2d 10, 2006 Miss. LEXIS 688 (Miss. 2006).

When the Mississippi Department of Mental Health enacted policies and procedures pursuant to Miss. Code Ann. § 41-4-7(g), it was enacting in a discretionary fashion and was thus immune from tort liability when a patient was injured allegedly because of a placement decision that was made for him while he was committed to a state hospital. *Dancy v. East Miss. State Hosp.*, 944 So. 2d 10, 2006 Miss. LEXIS 688 (Miss. 2006).

Officer's actions with regard to the icy condition on the highway involved an element of choice or judgment, and therefore his decision to promptly notify the Mississippi Department of Transportation of the condition rather than remaining at the scene after the first accident was discretionary and not ministerial, and there was no statute, regulation, or police department policy that outlined how the officer should have addressed the condition; accordingly, the precise time, manner, and conditions by which the officer's duties were to be observed were not prescribed, and therefore were left to the judgment of the officer. *Willing v. Benz*, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), sub. op., op. withdrawn, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

Regional housing authority's officers were immune from tort liability based on their actions in the wake of a flood that damaged a developer's apartment complex because their issuance of housing choice vouchers to the developer's tenants

during a declared state of emergency, although based upon their questionable reliance on erroneous statements, qualified as discretionary acts under Miss. Code Ann. 11-46-9(d). *Urban Developers LLC v. City of Jackson*, 468 F.3d 281, 2006 U.S. App. LEXIS 26435 (5th Cir. Miss. 2006).

Waterway district was immune from liability under Miss. Code Ann. § 11-46-9 in a wrongful death case because its discretionary decisions regarding the operation of a swimming facility were grounded in public policy, there was inadequate proof regarding knowledge of a missing buoy and signs, and there could have been other causes of a drowning. *Dotts v. Pat Harrison Waterway Dist.*, 933 So. 2d 322, 2006 Miss. App. LEXIS 504 (Miss. Ct. App. 2006).

While Miss. Code Ann. § 63-3-305 contains the term “shall”, it also contains the phrase, “as they may deem necessary”, which, as state legal precedent suggests, means that a local authority’s placement of traffic control devices is a discretionary duty. Because the placement of traffic control devices, including road construction signs, is a discretionary duty, Miss. Code Ann. § 11-46-9(1)(d) applies, and a county cannot be liable with regard to the placement of such signs, regardless of whether or not it abused its discretion in doing so. *Dozier v. Hinds County*, 379 F. Supp. 2d 834, 2005 U.S. Dist. LEXIS 15666 (S.D. Miss. 2005).

Trial court did not err in granting summary judgment to Mississippi Department of Transportation (DOT) in a wrongful death because the DOT was immune under Miss. Code Ann. § 11-46-9(1)(d), failing to warn of a dangerous condition, because the placement of warning signs was a discretionary function not within the context of ordinary care. *Barrentine v. Miss. DOT*, 913 So. 2d 391, 2005 Miss. App. LEXIS 270 (Miss. Ct. App. 2005).

Claimants in a wrongful death action were not entitled to a remand because a non-diverse county defendant had been fraudulently joined in the cause, making removal under 28 U.S.C.S. § 1441 appropriate. The county was not responsible for the placement of stop signs at the intersection where the accident occurred, and its placement of road construction signs

near the intersection was a discretionary governmental function, for which the county had immunity and no duty of ordinary care under Miss. Code Ann. § 11-46-9(1)(d); thus, the county had no basis for liability. *Dozier v. Hinds County*, 354 F. Supp. 2d 707, 2005 U.S. Dist. LEXIS 820 (S.D. Miss. 2005).

Where the victim was shot by her estranged husband the county was not liable for the failure of the justice court clerk or justice court judge to transmit the signed arrest warrant to the county sheriff’s department. The alleged conduct of both the justice court clerk and judge fell squarely within Miss. Code Ann. § 11-46-9(1)(a) and the trial court properly found that sovereign immunity prevented prosecution of the injured person’s negligence based claims; moreover, the actions of said officials were discretionary and the ordinary care standard was not applicable to Miss. Code Ann. § 11-46-9(1)(d). *Collins v. Tallahatchie County*, 876 So. 2d 284, 2004 Miss. LEXIS 798 (Miss. 2004).

Although a student suffered damages as a result of heatstroke during a high school football practice, the school district and the football coach were immune from liability under the Mississippi Tort Claims Act; acts or omissions of the coach were discretionary in nature. *Harris v. McCray*, 867 So. 2d 188, 2003 Miss. LEXIS 553 (Miss. 2003).

Statute did not provide immunity to the city and the driver as the discretionary act of deciding to help an invalid exit a van did not implicate any social, economic or political policy. *Stewart v. City of Jackson*, 804 So. 2d 1041, 2002 Miss. LEXIS 16 (Miss. 2002).

The addition of the abuse of discretion phrase into subsection (1)(d) of this section is not in derogation of the common law right and, therefore, the subsection need not be construed against any such limitation under the rules of statutory construction. *L.W. v. McComb Separate Mun. Sch. Dist.*, 1999 Miss. LEXIS 128 (Miss. Mar. 31, 1999), op. withdrawn, sub. op., 754 So. 2d 1136, 1999 Miss. LEXIS 273 (Miss. 1999).

The discretionary function exemption contained in subsection (1)(d) of this section did not bar an action in which a 14

year old student who was assaulted by a fellow student alleged that the school was negligent in failing to (1) maintain a safe environment, (2) properly monitor its grounds, (3) properly supervise its students, and (4) have a route of safe departure for detention students. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136, 1999 Miss. LEXIS 273 (Miss. 1999), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 2011 Miss. LEXIS 609 (Miss. Oct. 20, 2011), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012).

7. Ministerial duty.

Circuit court erred in finding that a school district was entitled to discretionary-function immunity from a bullied student's negligence and negligence per se claims where collectively, Miss. Code Ann. §§ 37-9-69, 37-11-67, and 37-11-69 imposed a ministerial duty on the school district to provide a safe school environment and prevent acts of bullying against students. *Smith v. Leake Cnty. Sch. Dist.*, 195 So. 3d 771, 2016 Miss. LEXIS 293 (Miss. 2016).

Examining discretionary-function immunity under Miss. Code Ann. § 11-46-9(1)(d) and case law, the overarching function involved, holding students to strict account for disorderly conduct and preventing acts of bullying, is ministerial. And while Miss. Code Ann. §§ 37-11-67 and 37-11-69 give a school district discretion as to how to prevent bullying, these statutes do not provide discretion as to whether to prevent bullying. Nor do these statutes override the ministerial statutory duty found in Miss. Code Ann. § 37-9-69 to provide a safe school environment. *Smith v. Leake Cnty. Sch. Dist.*, 195 So. 3d 771, 2016 Miss. LEXIS 293 (Miss. 2016).

Mississippi Transportation Commission and the Mississippi Department of Transportation breached the ministerial duties imposed by Miss. Code Ann. § 65-1-65 because the statute applied to the portion of the highway that was under construction and imposed a ministerial duty of maintenance and repair. *Miss. Transp. Comm'n v. Adams*, 197 So. 3d 406, 2016 Miss. LEXIS 232 (Miss. 2016).

Mississippi Transportation Commission (MTC) and the Mississippi Department of Transportation (MDOT) were not entitled to discretionary-function immunity from a widow's claims they violated Miss. Code Ann. § 65-1-67 because MTC decided to abide by the prescriptions in the regulations; since one of the regulations provided that all edge lines that had been covered or removed had to be replaced with temporary stripe before work is discontinued for the day, MTC and MDOT could not assert discretion. *Miss. Transp. Comm'n v. Adams*, 197 So. 3d 406, 2016 Miss. LEXIS 232 (Miss. 2016).

Placement and maintenance of traffic-control devices is discretionary, unless narrower duties encompassed in that function, such as placing and maintaining edge lines, have been rendered ministerial through statute or regulation. *Miss. Transp. Comm'n v. Adams*, 197 So. 3d 406, 2016 Miss. LEXIS 232 (Miss. 2016).

Trial court did not err in finding that the Mississippi Transportation Commission (MTC) and the Mississippi Department of Transportation (MDOT) were not entitled to discretionary-function immunity under the Mississippi Tort Claims Act because a widow produced evidence that MTC and MDOT breached specific ministerial duties imposed by their duly adopted regulations. *Miss. Transp. Comm'n v. Adams*, 197 So. 3d 406, 2016 Miss. LEXIS 232 (Miss. 2016).

Several functions and duties involved in sewage maintenance and operation are ministerial, and if a plaintiff can show that his or her injuries were caused by the government's act or failure to act in furtherance of one or more of such ministerial functions, that plaintiff can proceed with his or her claim. *Boroujerdi v. City of Starkville*, 158 So. 3d 1106, 2015 Miss. LEXIS 84 (Miss. 2015).

Function of maintaining a sewage system to maintain compliance with the Water Pollution Control Act is a ministerial function that is set within the larger discretionary function of general sewage creation and maintenance; the federal government sets the standards, and, although the states have some discretion with respect to how they will meet those standards, they have no choice but to

comply. *Boroujerdi v. City of Starkville*, 158 So. 3d 1106, 2015 Miss. LEXIS 84 (Miss. 2015).

Driver's negligence claim regarding the Mississippi Department of Transportation's (MDOT's) failure to repair and maintain a highway were not barred as a matter of law by Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2012) where Miss. Code Ann. § 65-1-65 required MDOT to maintain and repair state highways, and thus, its acts were ministerial. *Ala. Great S. R.R. Co. v. Jobes*, 156 So. 3d 871, 2015 Miss. LEXIS 37 (Miss. 2015).

School district, which was sued by plaintiff after she tripped over a section of conduit that protruded from the surface of a driveway in front of the district's administrative building, had a ministerial duty to repair the protruding conduit and was not entitled to discretionary immunity; accordingly, the circuit court did not err when it refused to apply the discretionary-immunity exemption of the Mississippi Tort Claims Act. *Natchez-Adams Sch. Dist. v. Bruce*, 2014 Miss. App. LEXIS 485 (Miss. Ct. App. Sept. 9, 2014), op. withdrawn, sub. op., — So. 3d —, 2015 Miss. App. LEXIS 221 (Miss. Ct. App. Apr. 21, 2015), sub. op., 168 So. 3d 1181, 2015 Miss. App. LEXIS 231 (Miss. Ct. App. 2015).

Trial court erred in granting the Department of Human Services (DHS) summary judgment on a mother's wrongful death claim where there were conflicting affidavits as to whether a report of abuse had been made to the DHS, resolution depended on the credibility of the affiants, DHS had no discretion to determine whether the phone calls from a medical center were reports under Miss. Code Ann. § 43-21-353(1) (2009), and thus, a genuine issue of fact existed as to whether the DHS's ministerial duty to investigate was triggered. *Watkins v. Miss. Dep't of Human Servs.*, 132 So. 3d 1037, 2014 Miss. LEXIS 136 (Miss. 2014).

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to bullying by other students, and failure to discipline those bullies, thus, Miss. Code Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did

not bar those claims. *R.S. v. Starkville Sch. Dist.*, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

Mississippi Department of Transportation (MDOT) was not immune in a wrongful death claim alleging that a failure to place warning signs around a highway culvert, as required by Miss. Code Ann. § 65-21-1, resulted in an auto accident that caused the decedent's death because § 65-21-1 imposed a ministerial duty, and, as Miss. Code Ann. § 63-3-301 and Miss. Code Ann. § 63-3-303 included no language suggesting abrogation or repeal of § 65-21-1, that section narrowly, precisely, and specifically requiring warning posts around culverts remained in effect as an exception to the general rule of § 63-3-303 that the MDOT had discretion over such placement; Miss. Code Ann. § 65-21-1 controlled the specific issue of guide and warning posts around culverts, and § 63-3-303 controlled the discretionary placement of traffic devices that were not the subject of a specific statutory mandate. *Miss. DOT v. Nosef*, 110 So. 3d 317, 2013 Miss. LEXIS 143 (Miss. 2013).

8. Police or fire protection.

At the time of the encounter, the police officer was acting in the course and scope of his police duties and that the detainee was engaged in criminal activity; the plain language of the Mississippi Tort Claims Act absolved officers from liability in these circumstances, so the district court properly dismissed Plaintiffs' state law claims against the officer. *Shumpert v. City of Tupelo*, 905 F.3d 310, 2018 U.S. App. LEXIS 27263 (5th Cir. Miss. 2018), cert. denied, — U.S. —, 139 S. Ct. 1211, 203 L. Ed. 2d 206, 2019 U.S. LEXIS 1058 (U.S. 2019).

County was not entitled to summary judgment under the police protection exemption from liability, following a two-vehicle accident involving a sheriff's deputy who was driving a sheriff's department vehicle, because there was a genuine issue of material fact as to whether the deputy's conduct in crossing a highway constituted reckless disregard for the safety and well-being of others. Additionally, the other driver's speeding at the time of the crash could not be imputed to

the deputy. *Irwin-Giles v. Panola Cty.*, 253 So. 3d 922, 2018 Miss. App. LEXIS 103 (Miss. Ct. App.), cert. denied, 252 So. 3d 596, 2018 Miss. LEXIS 394 (Miss. 2018).

Trial court correctly granted a city and a fire chief summary judgment on property damage claims because a firefighter and his wife did not allege the safety and well-being of any person was endangered by the fire department's actions fighting a fire, and thus, their claim was subject to immunity; the statute's plain language simply does not contemplate liability for actions that may relate merely to alleged reckless disregard of property. *Collins v. City of Newton*, 240 So. 3d 1211, 2018 Miss. LEXIS 123 (Miss. 2018).

Deputy sheriffs were not entitled to summary judgment on the ground of immunity for their police-protection activities because genuine issues of material fact existed as to whether they acted in reckless disregard of the safety and well-being of a car accident victim. Furthermore, there was a dispute as to whether, by fleeing law enforcement, the victim was engaged in criminal activity at the time of the accident because, according to the deputies' version of events, they were no longer in pursuit when the accident occurred. *Hill v. Hinds Cty.*, 237 So. 3d 838, 2017 Miss. App. LEXIS 446 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1269, 2018 Miss. LEXIS 121 (Miss. 2018).

City enjoyed police-protection immunity because when an accident wreck occurred a police officer had been engaged in the performance of police-protection activities, responding to a call about an unconscious person; the officer had been remiss but not reckless as he drove through a parking lot, and because his actions did not rise above simple negligence, police-protection immunity applied. *City of Clinton v. Tornes*, 252 So. 3d 34, 2018 Miss. LEXIS 371 (Miss. 2018).

Circuit court's dismissal of a driver's direct-liability claims was proper because the city admitted vicarious liability, and thus, there was no need to show it was negligent in hiring, training, retaining, or entrusting the officer; regardless of whether the city was negligent, the claim arose out of police-protection activities, and it could not be held liable unless the

officer acted with reckless disregard. *Carothers v. City of Water Valley*, 242 So. 3d 138, 2017 Miss. App. LEXIS 281 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 206 (Miss. 2018).

In a Mississippi Tort Claims Act case filed against the town and the chief of police resulting from the chief slapping plaintiff on her bottom while in the workplace, summary judgment was properly granted and her claim against the town for the failure to properly train and/or supervise the chief was properly dismissed because plaintiff failed to provide any legal authority that the town was required to provide training in addition to that training statutorily required by the Mississippi Law Enforcement Training Academy; the town nonetheless provided the chief with some local training before and after the incident; and the chief acted outside the course and scope of his law-enforcement duties when he committed the simple-assault. *Harris v. Town of Woodville*, 196 So. 3d 1121, 2016 Miss. App. LEXIS 477 (Miss. Ct. App. 2016).

In a case where plaintiff sued the city pursuant to Mississippi Tort Claims Act after he was arrested for discharging a firearm in the city limits when he informed police officers that he discharged a firearm to prevent an attack by a neighbor's dog, the trial court did not err in denying the city's motion to dismiss plaintiff's complaint because plaintiff alleged in his complaint that the officers – acting within the scope of their employment and in complete disregard for his rights – grossly and negligently arrested him, causing physical and psychological damages; thus, plaintiff's pleading was sufficient under the liberal pleadings standard, and the trial court did not err in finding plaintiff sufficiently stated a claim against the city. *City of Vicksburg v. Williams*, 191 So. 3d 1242, 2016 Miss. LEXIS 213 (Miss. 2016).

In a case in which a city appealed a judgment awarding damages to plaintiff for injuries he sustained when police officers shot and arrested him, the appellate court concluded that the record supported the circuit court's findings that the officers acted in reckless disregard for the public's safety, which precluded immunity under

the Mississippi Tort Claims Act. *City of Jackson v. Jackson*, 200 So. 3d 1141, 2016 Miss. App. LEXIS 305 (Miss. Ct. App. 2016).

Circuit court properly affirmed a county court's decision that a city was immune from liability under the Mississippi Tort Claims Act for damages a driver sustained when he struck a displaced manhole cover during a heavy rain storm because the driver failed to create a genuine issue of material fact by affidavits or as otherwise provided that the manhole cover was not displaced solely by the effect of the rain. *Ostrowski v. City of D'Iberville*, 269 So. 3d 418, 2018 Miss. App. LEXIS 286 (Miss. Ct. App. 2016), cert. denied, 260 So. 3d 796, 2019 Miss. LEXIS 12 (Miss. 2019).

In a claim against the city under the Mississippi Tort Claims Act for plaintiffs' damages resulting from a collision with a suspect's vehicle involved in a high speed pursuit by a police officer, governmental immunity did not shield the city from liability because the officer's continuation of a high speed pursuit, realizing that the suspect, who had committed only a misdemeanor offense, was unlikely to stop, constituted a violation of the department's established policy and a reckless disregard for the safety of the public. *City of Jackson v. Lewis*, 153 So. 3d 689, 2014 Miss. LEXIS 580 (Miss. 2014).

City could not avail itself of governmental immunity under the Mississippi Tort Claims Act because substantial evidence supported the finding that the city, through a police officer, acted with reckless disregard for the safety of the public, resulting in the death of a passenger and injury to others; the officer's continuing pursuit of a suspect constituted a violation of the police department's established policy, and he knew or should have known that the suspect was not going to stop. *City of Jackson v. Lewis*, 146 So. 3d 320, 2014 Miss. LEXIS 270 (Miss.), op. withdrawn, sub. op., 153 So. 3d 689, 2014 Miss. LEXIS 580 (Miss. 2014).

Volunteer firefighter was not immune from suit under the Mississippi Tort Claims Act (MTCA) for claims arising from an automobile accident because the volunteer fire department was not a political subdivision of the State. Under Miss.

Code Ann. § 95-9-1(3)(b), the firefighter could be liable for negligent operation of a vehicle. *Poppenheimer v. Estate of Coyle*, 98 So. 3d 1059, 2012 Miss. LEXIS 486 (Miss. 2012).

Court properly entered judgment for appellees under Miss. Code Ann. § 11-46-9 after a vehicle being chased by police struck their vehicle, because the pursuing officer was not familiar with the police department's pursuit policy and continued to pursue a suspect into a residential area, despite the fact that the suspect had driven recklessly on the highway, was becoming increasingly reckless, and was obviously not going to stop. *City of Jackson v. Law*, 65 So. 3d 821, 2011 Miss. LEXIS 219 (Miss. 2011).

Deputy who stopped at an intersection and, with his blue lights and sirens activated, slowly proceeded across in a stop-and-start fashion, exercised sufficient safety measures to prompt other drivers near the intersection to yield the right-of-way, including the driver traveling in the lane ahead of plaintiffs. Thus, viewing the evidence in the light most favorable to plaintiffs, the deputy's conduct did not demonstrate a conscious indifference to consequences, nor did it rise to the level of reckless disregard for the safety and well-being of persons not engaged in criminal activity, so as subject the county to liability under Miss. Code Ann. § 11-46-9(1)(c). *Rayner v. Pennington*, 25 So. 3d 305, 2010 Miss. LEXIS 12 (Miss. 2010).

Where police officers, responding to a 911 call relating to a domestic complaint, went to the house and interviewed all of the parties present, and where neither the victim nor her boyfriend expressed a desire to press charges against the other, the trial court did not err in finding that there was insufficient evidence to establish intentional harm by the officers, or a conscious indifference on their part to the consequences of their actions. As such, the officers did not act with reckless disregard for the safety and well-being of the victim, and liability under Miss. Code Ann. § 11-46-9(1)(c) did not exist. *City of Laurel v. Williams*, 21 So. 3d 1170, 2009 Miss. LEXIS 566 (Miss. 2009).

The trial court did not err in finding in favor of a driver in her action against a

city and a police officer under the Mississippi Tort Claims Act (MTCA), because there was substantial, credible evidence to support a finding of reckless disregard for public safety on the part of the officer. The officer knew that there was a good chance that traffic would be coming through the green light of the busy intersection and she proceeded against her own red light, even though her view to the left was completely blocked by a truck; therefore, the trial court did not err in finding that the officer's conduct went beyond mere negligence to reckless disregard and that the city was therefore not immune from liability under the MTCA. *City of Jackson v. Presley*, 40 So. 3d 578, 2009 Miss. App. LEXIS 793 (Miss. Ct. App. 2009), rev'd, 40 So. 3d 520, 2010 Miss. LEXIS 385 (Miss. 2010).

In a wrongful death case in which the administratrix of the deceased's estate appealed the trial court's dismissal of the case, she unsuccessfully argued that a police officer acted in reckless disregard of the deceased's safety and well-being by failing to properly investigate the 911 call. Even assuming that the officer's investigation was inadequate, his behavior was, at most, simple negligence, which did not support a finding of liability under the Mississippi Tort Claims Act. *Davis v. City of Clarksdale*, 18 So. 3d 246, 2009 Miss. LEXIS 431 (Miss. 2009).

Trial court did not err in entering judgment in favor of a police officer in an action filed by a father and sons to recover damages for injuries they sustained when the officer hit their ATV because the officer's actions were protected under the sovereign immunity provided by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c), when they did not amount to reckless disregard for the safety of others; an expert in police pursuit interviewed the officer, reviewed the depositions and the accident report, and viewed the accident scene, and he ultimately concluded that the officer did not act in reckless disregard in the accident. *Giles v. Brown*, 31 So. 3d 1232, 2009 Miss. App. LEXIS 548 (Miss. Ct. App. 2009), cert. denied, 31 So. 3d 1217, 2010 Miss. LEXIS 178 (Miss. 2010).

In a 42 U.S.C.S. § 1983 suit, an arrestee adequately pled claims for exces-

sive use of force against a police officer because the arrestee had a clearly established Fourth Amendment right not to be bodily removed from his car and thrown to the ground after allegedly committing a traffic infraction; the officer's actions were not shielded by the doctrine of qualified immunity or by governmental immunity arising under Miss. Code Ann. § 11-46-9(1). *Stepney v. City of Columbia*, 2009 U.S. Dist. LEXIS 16376 (S.D. Miss. Feb. 18, 2009).

In a wrongful death case in which a mother asserted state law tort claims for negligent and/or intentional infliction of emotional distress and for loss of consortium against a sheriff, those claims failed. Not only was the sheriff protected from liability by the police protection exception under Miss. Code Ann. § 11-46-9(1)(c), but even if he was not exempt, the mother's allegations and proof did not support her claims in any event. *Bradley v. City of Jackson*, 590 F. Supp. 2d 817, 2008 U.S. Dist. LEXIS 95683 (S.D. Miss. 2008).

In a mother's wrongful death action, the trial court properly held that the actions of a police chief in attempting to execute an arrest warrant against a daughter's boyfriend were discretionary in nature and that the city was entitled to discretionary function immunity pursuant to Miss. Code Ann. § 11-46-9(1)(d) because the chief's actions in attempting to execute the warrant were reasonable and appropriate. *Estate of Carr v. City of Ruleville*, 5 So. 3d 455, 2008 Miss. App. LEXIS 510 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 136 (Miss. 2009).

Mississippi Department of Public Safety and the Mississippi Highway Patrol were exempt from liability, under Miss. Code Ann. § 11-46-9(1)(c), because plaintiff did not meet his burden of showing by a preponderance of the evidence that a first law enforcement officer intentionally disregarded information and thus, acted in reckless disregard when he misidentified plaintiff or his vehicle because (1) the first officer knew only the make, model, and color of vehicle for which he was looking; (2) the first officer pulled over a vehicle which appeared to fit the description he had been given, which

was traveling very near to a pursuing officer at the time the first officer was approaching the pursuing officer to assist him in the pursuit; (3) after the stop, plaintiff, by his own admission, neither identified himself nor complied with the first officer's requests during takedown and handcuffing; and (4) although the first officer mistakenly identified plaintiff as the suspect, plaintiff failed to prove that the officers acted in any way other than reasonably under the circumstances. *Philips v. Miss. Dep't of Pub. Safety*, 978 So. 2d 656, 2008 Miss. LEXIS 171 (Miss. 2008).

Grant of summary judgment in favor of the city and police officer in the jogger's action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, after he was struck by the police officer while jogging was appropriate because the jogger failed to prove that the officer acted with reckless disregard of the safety and well-being of others, Miss. Code Ann. § 11-46-9(1)(c). *Morton v. City of Shelby*, 984 So. 2d 323, 2007 Miss. App. LEXIS 761 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 274 (Miss. 2008).

While Miss. Code Ann. § 37-7-321 and Miss. Code Ann. § 37-7-323 allowed schools to retain independent contractors to work as peace officers on school grounds, the legislature however did not provide an express grant of immunity to those independent contractors under Miss. Code Ann. § 19-19-5 or the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-9; accordingly, the trial court erred in finding that the security contractor was immune to suit by virtue of the MTCA. *Knight v. Terrell*, 961 So. 2d 30, 2007 Miss. LEXIS 408 (Miss. 2007).

Because defendants, two county attorneys, a sheriff, and the sheriff's deputy, were acting in their official roles in enforcing a facially valid Virginia custody order granting custody of children to the children's mother, immunity under Miss. Code Ann. § 11-46-7(2) applied to the claims of plaintiffs, a father and his adult son who had been granted custody of the children by a Mississippi court. *Blake v. Wilson*, 962 So. 2d 705, 2007 Miss. App. LEXIS 252 (Miss. Ct. App. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c) for the decedent's death, and therefore it was properly granted summary judgment because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. *Willing v. Estate of Benz*, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q) for the decedent's death, and therefore it was properly granted summary judgment because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch. *Willing v. Estate of Benz*, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

Judgment was properly entered for a city in a personal injury case based on sovereign immunity under Miss. Code Ann. § 11-46-9(1)(c) because an officer did not act with reckless disregard when she pursued a suspect with outstanding warrants since she saw an open container in his car and suspected he was driving under the influence. *Broome v. City of Columbia*, 952 So. 2d 1050, 2007 Miss. App. LEXIS 190 (Miss. Ct. App. 2007).

City was entitled to immunity under the police protection exemption under Miss. Code Ann. § 11-46-9(1)(c), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because the officer's failure to remove the keys from and/or lock the doors of his patrol car did not show a reckless disregard for the safety of others, given that the party guest testified that there was a crowd of 15 or more angry teenagers who were wielding knives and throwing sticks, bricks, and other objects and who the party guest was convinced were intent on killing or seriously injuring him. *Chap-*

man v. City of Quitman, 954 So. 2d 468, 2007 Miss. App. LEXIS 176 (Miss. Ct. App. 2007).

Summary judgment was properly granted to a city in a negligence case because it was immune under Miss. Code Ann. § 11-46-9(1)(c) since an officer was not acting with reckless disregard when she pursued a suspect while trying to serve outstanding domestic warrants; the officer suspected he was driving under the influence and saw an open container. *Broome v. City of Columbia*, 2006 Miss. App. LEXIS 762 (Miss. Ct. App. Oct. 17, 2006), sub. op., op. withdrawn, 952 So. 2d 1050, 2007 Miss. App. LEXIS 190 (Miss. Ct. App. 2007).

Record showed that the police officers did not exercise reckless disregard when they chose to charge the victim's murderer with simple assault where the police officer was apparently unaware that an aggressor may be charged with domestic violence if that person commits an assault upon one with whom they formerly resided; the administratrix also failed to present any evidence to show how the town acted in a willful, wanton, or wrongful manner in failing to relay a detailed account of the assault to the murderer's parole officer or by not informing the municipal judge of the murderer's prior aggravated assault conviction. *Fair v. Town of Friars Point*, 930 So. 2d 467, 2006 Miss. App. LEXIS 419 (Miss. Ct. App. 2006).

Defendants were properly granted judgment on plaintiffs' personal injury claims because defendant police officer's conduct during a vehicle pursuit did not rise to the level of reckless disregard, which was required by Miss. Code Ann. § 11-46-9(1)(c) for a finding of liability; the officer took specific steps in an attempt to safeguard other vehicles that may have entered the intersection where the accident occurred, including, inter alia, sounding his air horn and reducing his speed. *Cole v. Miss. Dep't of Pub. Safety*, 930 So. 2d 472, 2006 Miss. App. LEXIS 428 (Miss. Ct. App. 2006).

University police corps provided local law enforcement with college-educated, specialized, quasi-military trained police officers to assist in protecting against violent crime; therefore, it was related to police protection and satisfied the govern-

ment/proprietary distinction, as police training was a governmental function. *Hayes v. Univ. of Southern Miss.*, 952 So. 2d 261, 2006 Miss. App. LEXIS 614 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 190 (Miss. 2007).

Directed verdict in favor of the sheriff and county in the family's action alleging reckless disregard by an auxiliary deputy sheriff concerning an accident involving the deputy and their son was appropriate under Miss. Code Ann. § 11-46-9(1)(c) because the deputy's actions, at the most, amounted to negligence; the deputy was traveling no more than five miles over the speed limit and Miss. Code Ann. § 63-3-517 permitted him to do so because he was responding to an accident. *Peebles v. Winston County*, 929 So. 2d 385, 2006 Miss. App. LEXIS 373 (Miss. Ct. App. 2006).

Record revealed immense suffering by the resident and his wife and children due to the resident's arrest for a crime which he unquestionably did not commit, and the cellular phone company paid for transposing numbers that led to the resident's arrest; the city police officers were at the most, negligent, they did not act in reckless disregard of the safety and well-being of the resident or any other citizen, and pursuant to Miss. Code Ann. § 11-46-9(1)(c), the city was exempt from liability. *City of Greenville v. Jones*, 925 So. 2d 106, 2006 Miss. LEXIS 122 (Miss. 2006).

In plaintiffs' personal injury action against a police officer, court did not err in finding that the officer was immune from liability under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c), because the officer was justified in drawing his gun upon stopping plaintiffs' car; officer had received call that two cars were speeding and that shots had been fired. *Smith v. Brookhaven*, 914 So. 2d 180, 2005 Miss. App. LEXIS 50 (Miss. Ct. App.), cert. denied, 921 So. 2d 344, 2005 Miss. LEXIS 750 (Miss. 2005).

Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and sheriff realized there was no

longer probable cause to hold the couple, sovereign immunity applied in the couple's suit against the sheriff and the county for false arrest and malicious prosecution, under the exception of Miss. Code Ann. § 11-46-9(1)(c). *Keen v. Simpson County*, 904 So. 2d 1157, 2004 Miss. App. LEXIS 1039 (Miss. Ct. App. 2004).

In a mother's suit against a police officer and the department of public safety when her son was killed in a car accident while riding with his father soon after the officer had given the father a speeding ticket, judgment in the officer's favor was proper as his failure to check the father's sobriety did not rise to the level of reckless disregard required for the mother to recover against the State. *Thomas ex rel. Thomas v. Miss. Dep't of Pub. Safety*, 882 So. 2d 789, 2004 Miss. App. LEXIS 930 (Miss. Ct. App. 2004).

Evidence showed the officer was traveling approximately 37 miles per hour with lights and sirens activated, there was nothing obstructing the view of either the person later injured or the officer, and the greater weight of evidence also proved that the person's left turn signal was not activated. In addition, the officer had consciously stopped at the previous two intersections because the officer considered both of those to be blind intersections, and therefore, the officer's behavior supported the finding that the officer appreciated the risk involved in approaching the intersection and did not act with reckless disregard. *Davis v. Latch*, 873 So. 2d 1059, 2004 Miss. App. LEXIS 445 (Miss. Ct. App. 2004).

In the context of actions pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 to 11-46-23, the common thread running through cases where an officer acts with reckless disregard in operating a motor vehicle is an appreciation of the unreasonable risk of danger involved coupled with a conscious indifference to the consequences that are certain to follow. *Davis v. Latch*, 873 So. 2d 1059, 2004 Miss. App. LEXIS 445 (Miss. Ct. App. 2004).

Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2) barred plaintiff's state law claims against the police chief and the officer because the wrongful arrest of

plaintiff occurred in the scope and course of their employment, but did not bar the state law claims against the city under Miss. Code Ann. § 11-46-9(1)(c) because the officer was acting within the scope of his employment when he acted with reckless disregard in the arrest of the mother. *Craddock v. Hicks*, 314 F. Supp. 2d 648, 2003 U.S. Dist. LEXIS 25637 (N.D. Miss. 2003).

Department of Public Safety was not immune from liability in a suit by a driver. A state trooper, who was speeding excessively and acted in reckless disregard of the driver's safety; the fact that the driver made a left turn did not matter, as this was not criminal activity. *Miss. Dep't of Pub. Safety v. Durn*, 861 So. 2d 990, 2003 Miss. LEXIS 871 (Miss. 2003).

As a decedent was engaged in criminal activity (drunk driving) and there was a causal nexus between that activity and his death in a collision with a fire truck, the city was immune from a wrongful death suit under Miss. Code Ann. § 11-46-9(1)(c). *Estate of Williams v. City of Jackson*, 844 So. 2d 1161, 2003 Miss. LEXIS 209 (Miss. 2003).

Operating a vehicle involves both the moving and the stopping of a vehicle, and when these are done under the influence of alcohol, it is considered criminal activity which operates to limit the duty owed by police and fire personnel under Miss. Code Ann. § 11-46-9(1)(c); however, in order for recovery from a governmental entity to be barred, the criminal activity has to have some causal nexus to the wrongdoing of the tortfeasor. *Estate of Williams v. City of Jackson*, 844 So. 2d 1161, 2003 Miss. LEXIS 209 (Miss. 2003).

Dismissal of the driver and passengers' action against the city and police officer after they were struck by the officer's vehicle was proper where the officer's action evinced no recklessness, Miss. Code Ann. § 11-46-9(1)(c); he was remiss in paying attention to traffic directly in his lane, but he was guilty of simple negligence and nothing more. *Joseph v. City of Moss Point*, 856 So. 2d 548, 2003 Miss. App. LEXIS 430 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 720 (Miss. 2003).

Where conflicting evidence was presented as to whether the police officer,

who was engaged in a high speed chase when the officer struck the decedent, had the officer's blue lights flashing, summary judgment pursuant to Miss. R. Civ. P. 56 was improperly granted in favor of the city in the wrongful death action; the conflicting testimony raised an issue of material fact as to whether the officer's behavior constituted reckless disregard under Miss. Code Ann. § 11-46-9(1)(c). *Johnson v. City of Cleveland*, 846 So. 2d 1031, 2003 Miss. LEXIS 257 (Miss. 2003).

In a wrongful death suit against a town, the town was correctly granted summary judgment since there were no facts of record to support the allegation that the town acted with reckless disregard for the decedent's safety; only 13 minutes elapsed between the decedent's report to the police that he had been shot at and his fatal shooting, and the police acted responsibly and within their discretion. *Titus v. Williams*, 844 So. 2d 459, 2003 Miss. LEXIS 206 (Miss. 2003).

The "reckless disregard" exception to the Mississippi Tort Claims Act in Miss. Code Ann. § 11-46-9(1)(c) was not applicable to the homeowners' suit against county for delay in 911 response by police, which did not involve personal injury, but only loss of property. *Lee County v. Davis*, 838 So. 2d 243, 2003 Miss. LEXIS 7 (Miss. 2003).

Government and its employees acting within the course and scope of their employment are not liable for any claims arising out of an act or omission of the employee engaged in the performance of execution of duties or activities relating to police or fire protection, unless it is proven by a preponderance of the evidence that the employee was acting in a reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury; therefore, a trial court correctly determined that a city and its police officer waived immunity under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., because an injured party established that the officer acted in reckless disregard of his safety when he answered a burglary call without activating his lights or siren. *City of Jackson v. Lipsey*, 834 So. 2d 687, 2003 Miss. LEXIS 8 (Miss. 2003).

Maintenance and inspection of police vehicles are activities related to police protection, so that a city and an officer were immune from liability arising out of negligence in the performance of either act under the police protection exemption of Miss. Code Ann. § 11-46-9(1)(c) when the brakes in a police car failed and the police car collided with another car. *McGrath v. City of Gautier*, 794 So. 2d 983, 2001 Miss. LEXIS 167 (Miss. 2001).

In an action in which the plaintiff alleged that he was injured by a security officer for a water supply district, the water supply district was not entitled to summary judgment as the record did not contain any evidence that the district engaged in a policy-oriented decision-making process concerning the supervision of its employees. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584, 2001 Miss. LEXIS 84 (Miss. 2001).

The criminal activity supporting the exemption for police or fire protection unless the government employee acted in reckless disregard of the safety of a person "not engaged in criminal activity at the time of injury" must be more than fortuitous, but need not rise to the level of a felony. *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So. 2d 584, 2001 Miss. LEXIS 84 (Miss. 2001).

A governmental agency and its employees, acting within the course and scope of their official duties, and engaged in the performance or execution of duties relating to police or fire protection, will not be liable for any claim arising out of the performance or execution of those duties, unless it is proven, by a preponderance of the evidence, that the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury. *Simpson v. City of Pickens*, 761 So. 2d 855, 2000 Miss. LEXIS 133 (Miss. 2000).

A police officer and the city that employed him were not entitled to immunity with regard to a motor vehicle accident involving the officer since the evidence showed reckless disregard by the officer of the safety and well-being of others where (1) the officer testified to seeing the plaintiff's vehicle stopped at the a townhome complex, (2) the plaintiff attempted a left

turn from the complex, (3) the officer was driving at a minimum of 57 miles per hour in a posted 35 miles per hour zone and struck the plaintiff's vehicle in the driver's door knocking the vehicle 75 feet, and (4) the officer was in a non-emergency situation using neither sirens nor flashing lights and was going to meet fellow officers for dinner. *City of Jackson v. Perry*, 764 So. 2d 373, 2000 Miss. LEXIS 107 (Miss. 2000).

The fact that the plaintiff was driving without a license at the time that his vehicle was struck by a police officer's vehicle being driven in a reckless manner did not bar his recovery for injuries sustained in the accident as the officer's conduct did not have anything to do with the plaintiff's criminal activity. *City of Jackson v. Perry*, 764 So. 2d 373, 2000 Miss. LEXIS 107 (Miss. 2000).

A deputy sheriff acted with reckless disregard within the meaning of subsection (1)(c) of this section when he backed up the incline entrance to a parking lot knowing he could not be sure the area was clear. *Maye v. Pearl River County*, 758 So. 2d 391, 1999 Miss. LEXIS 198 (Miss. 1999).

In an action arising from a collision with a drunk driver in which the plaintiff alleged that, immediately prior to the accident, a city police officer had stopped the drunk driver for operating his vehicle in an erratic fashion and failing to have the vehicle's headlights on, but permitted the drunk driver to continue driving even though he knew the driver was intoxicated and incapable of driving in a safe and prudent manner, the trial court erred in holding that the complaint was insufficient because it did not allege that the officer intended to harm the plaintiff; the proper focus should have been whether the officer intended to do the act that caused harm to the plaintiff. *Turner v. City of Ruleville*, 735 So. 2d 226, 1999 Miss. LEXIS 113 (Miss. 1999).

Reckless disregard within the meaning of subsection (1)(c) of this section is synonymous with willfulness and wantonness. *Turner v. City of Ruleville*, 735 So. 2d 226, 1999 Miss. LEXIS 113 (Miss. 1999).

A police officer who detained the plaintiff when she went to the police station to

inquire about an outstanding warrant for shoplifting did not act in reckless disregard for the plaintiff's safety and well-being since he was faced with an arrest warrant that was valid on its face and had a duty to execute the warrant. *Foster v. Noel*, 715 So. 2d 174, 1998 Miss. LEXIS 270 (Miss. 1998).

9. Immunity.

Supreme Court of Mississippi overruled *Keen v. Simpson County*, 904 So. 2d 1157, 2004 Miss. App. LEXIS 1039 (Miss. Ct. App. 2004) Code Ann. § 11-46-9(1)(c) to the malicious-prosecution claim against Simpson County and its sheriff. *Univ. of Miss. Med. Ctr. v. Oliver*, 235 So. 3d 75, 2017 Miss. LEXIS 339 (Miss. 2017).

Circuit court properly granted a county's motion for summary judgment in a personal injury action filed by a visitor to the county correctional center because the county was entitled to immunity under the Mississippi Torts Claim Act where there was no proof of any recent malfunctioning of a security gate to put the county on notice of a dangerous condition and there was no evidence that a deputy intended to close the gate on the visitor where the evidence demonstrated that the deputy accidentally closed the visitor's leg in the gate when she tried to reset it. *Ware v. Adams Cnty.*, 199 So. 3d 1257, 2016 Miss. App. LEXIS 547 (Miss. Ct. App. 2016).

In a condemnation proceeding, the trial court did not err in denying a city's motion for summary judgment, for its immunity against tort claims did not encompass claims of constitutional violations. *City of Jackson v. Jordan*, 202 So. 3d 199, 2016 Miss. LEXIS 347 (Miss. 2016).

Circuit court erred in awarding homeowners damages to repair their home because the city was immune from liability under the Mississippi Tort Claims Act; the city did not act arbitrarily and capriciously in allowing one contractor to continue to perform work on the homeowners' residence after he withdrew because the city permit manager's inclusion of a second contractor's name was a genuine mistake, and the city had no police for when a contractor released a permit and withdraw. *City of Tupelo v. McMillin*, 192 So.

3d 948, 2016 Miss. LEXIS 152 (Miss. 2016).

In a false imprisonment claim, a county was immune based on the inmate exception under this statute because an injured party was a pretrial detainee; an argument that the claims arose at the time he was not an inmate, but was in the process of being booked, was rejected. *Hinds Cnty. v. Burton*, 187 So. 3d 1016, 2016 Miss. LEXIS 136 (Miss. 2016).

Injured party could not recover from a city and county following a shooting because they were immune based on the police-protection exemption under this statute where agents and a deputy all testified that they either saw or heard someone shooting, and the injured party presented nothing that contradicted the testimony. An officer's act of returning fire was objectively reasonable under the circumstances, and a violation of a police policy was not dispositive on the issue of reckless disregard. *Hinds Cnty. v. Burton*, 187 So. 3d 1016, 2016 Miss. LEXIS 136 (Miss. 2016).

City and police officer were exempt from liability for hitting a minor's vehicle because (1) the minor was engaged in criminal activity, as the minor had marijuana in the minor's system and a blood alcohol content above the legal limit for minors, and (2) a causal nexus existed between this activity and the minor's death. *McElroy v. City of Brandon*, 198 So. 3d 373, 2015 Miss. App. LEXIS 678 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 596, 2016 Miss. LEXIS 374 (Miss. 2016).

Trial court properly entered a judgment in favor of a city and its police department and found that were entitled to governmental immunity because, while a police officer was negligent in driving his vehicle when he hit a student with his patrol car in front of a school after a football game ended, his conduct did not rise to the level of reckless disregard. *Crisler v. City of Crystal Springs*, 171 So. 3d 588, 2015 Miss. App. LEXIS 403 (Miss. Ct. App. 2015).

County had immunity under the Mississippi Tort Claims Act for a county justice court clerk's negligence in failing to cancel an arrest warrant because the clerk's administrative duty to issue notice of the

cancelled warrant was judicial in nature; the clerk had an administrative duty to issue notice of the cancelled warrant, clearly an act of a judicial nature, which related to and derived from the judge's decision. *DeSoto County v. Dennis*, 160 So. 3d 1154, 2015 Miss. LEXIS 174 (Miss. 2015).

It would be patently unfair to affirm summary judgment in the city's favor without the property owner having an opportunity to attempt to conform his complaint and proof to the current approach to discretionary function immunity; municipal sewage maintenance generally is a discretionary function, but several narrower functions and duties associated with sewage maintenance are mandated by statute or regulation and thus are ministerial and removed from discretionary function immunity. *Boroujerdi v. City of Starkville*, 158 So. 3d 1106, 2015 Miss. LEXIS 84 (Miss. 2015).

Trial court was correct when it granted the Mississippi Department of Transportation summary judgment on all of the property owners' claims because all of their causes of action were barred by the design exemption; although there is a waiver of immunity for claims for money damages arising out of the State's alleged tortious conduct, there is no such waiver of immunity for injunctive relief in this context. *Garretson v. Miss. DOT*, 156 So. 3d 241, 2014 Miss. LEXIS 579 (Miss. 2014).

Trial court did not err in granting the Mississippi Department of Transportation (MDOT) summary judgment in property owners' action alleging that bypass construction caused silt to flood onto their land damage their timber because MDOT was immune under subsection (1)(p); MDOT submitted an affidavit from its roadway design engineer, who testified that the plans or designs for the project were approved in advance of construction. *Garretson v. Miss. DOT*, 156 So. 3d 241, 2014 Miss. LEXIS 579 (Miss. 2014).

There was no evidence in the record that conditions existed that would have made a ramp dangerous when plaintiff fell on it, and the record was also void of any indication that the ramp was wet from another source other than weather

conditions. Hence, plaintiff failed to overcome defendant county's assertion of immunity under Miss. Code Ann. § 11-46-9(1)(v). *Case v. Bd. of Supervisors*, 164 So. 3d 1043, 2014 Miss. App. LEXIS 609 (Miss. Ct. App. 2014).

Trial court erred in granting summary judgment to the Department of Transportation and the Transportation Commission (the defendants) on the injured parties' negligence claim because issues of fact existed as to whether the repair of a bridge was performed in a negligent manner and they were not immune from liability. *Logan v. Miss. DOT*, 174 So. 3d 264, 2014 Miss. App. LEXIS 486 (Miss. Ct. App. 2014), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 180 (Miss. 2015), *aff'd* in part and *rev'd* in part, 174 So. 3d 249, 2015 Miss. LEXIS 460 (Miss. 2015).

Under the Mississippi Tort Claims Act (MTCA), it was the function of a governmental entity—not the acts performed in order to achieve that function—to which immunity did or did not ascribe under the MTCA. Pursuant to the *Montgomery* decision, the line of cases holding otherwise was overruled; the Supreme Court of Mississippi holds that, where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity. *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Commissioner of the state department of corrections, the community correctional director for the region, and a correctional facility officer who assigned work were entitled to immunity from state law claims brought by an inmate based on injuries sustained when he was subjected to dangerous conditions and contracted tuberculosis while fulfilling the terms of his restitution at a chicken-processing plant. *Jones v. Tyson Foods, Inc.*, 971 F. Supp. 2d 648, 2013 U.S. Dist. LEXIS 143376 (N.D. Miss. 2013).

Mississippi did not have to show that it qualified for immunity under Miss. Code Ann. § 11-46-9(1)(v) as it was immune from a driver's suit under Miss. Code Ann. § 11-46-9(1)(d); if an entity qualified for immunity under § 11-46-9(1)(d), the conditions for immunity under § 11-46-

9(1)(v) were irrelevant. *Little v. Miss. DOT*, 129 So. 3d 192, 2012 Miss. App. LEXIS 627 (Miss. Ct. App. 2012), *rev'd*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

10. Waiver of immunity.

In a negligence action filed against a school district after a student was sexually assaulted, a school district had governmental immunity under the Mississippi Torts Claims Act because the oversight of student conduct and school safety involved an element of choice or judgment and constituted a discretionary function; a statute did not set forth how the ministerial duty to hold students accountable for disorderly conduct at school was to be carried out. Moreover, the school district's actions regarding the implementation of school safety measures and student discipline involved both social and economic policy; however, this immunity was waived due to delay and active participation in the litigation. *Doe v. Rankin County Sch. Dist.*, 2014 Miss. App. LEXIS 617 (Miss. Ct. App. Oct. 28, 2014), *rev'd*, 189 So. 3d 616, 2015 Miss. LEXIS 552 (Miss. 2015).

School district was not entitled to an award of summary judgment, based upon governmental immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because, although the school district was immune under Miss. Code Ann. § 11-46-9(1)(d), the school district waived this affirmative defense by actively participating in the litigation process and unreasonably delayed its pursuit of immunity for sixteen months. *Doe v. Rankin County Sch. Dist.*, 2013 Miss. App. LEXIS 850 (Miss. Ct. App. Dec. 10, 2013), *sub. op.*, 2014 Miss. App. LEXIS 617 (Miss. Ct. App. Oct. 28, 2014).

11. Illustrative cases.

Circuit court properly granted a county summary judgment on a negligence claim where the 16 to 18 foot open drainage channel into which the individual fell was an open and obvious danger, the sole proximate cause of the individual's injuries was his own negligence in walking directly into the channel at night without a flashlight. *Campbell v. Harrison Cty. Bd.*

of Supervisors, 269 So. 3d 1269, 2018 Miss. App. LEXIS 574 (Miss. Ct. App. 2018), cert. denied, 268 So. 3d 1280, 2019 Miss. LEXIS 194 (Miss. 2019).

It was appropriate to reverse summary judgment for a city dismissing an estate's wrongful death claim to allow the estate to fully present a negligence claim because (1) the case was pending when the applicable test was overruled and the public-policy function test was reinstituted, and (2) questions existed regarding the applicability of both Miss. Code Ann. § 11-46-9(1)(d) and (v) to the facts. *Hudson v. Yazoo City (Estate of Hudson)*, 246 So. 3d 872, 2018 Miss. LEXIS 294 (Miss. 2018).

Court of appeals erred in reversing the trial court's judgment because it ignored substantial, credible, and reasonable evidence that supported the trial court's finding that Mississippi Department of Wildlife, Fisheries, and Parks officers acted with reckless disregard for the safety of others; the trial court's finding that the officers' testimony was not credible because substantial, credible, and reasonable evidence in the record contradicted the testimony could not be discarded. *Miss. Dep't of Wildlife v. Webb*, 248 So. 3d 772, 2018 Miss. LEXIS 127 (Miss. 2018).

In a suit alleging an officer acted with reckless disregard for public safety, while applying the ten factors used to evaluate pursuit cases erred, substantial evidence showed reckless disregard, under the totality of the circumstances, removing a city's Mississippi Tort Claims Act immunity, because the officer sped down a darkly lit street without using emergency lights and a siren to warn others of the officer's presence. *City of Jackson v. Graham*, 226 So. 3d 608, 2017 Miss. App. LEXIS 538 (Miss. Ct. App. 2017).

Circuit court improperly ruled for a family in their action claiming that Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) conservation officers acted with reckless disregard for the safety of boaters because it erroneously applied the legal standard for reckless disregard; the violation of a MDWFP standard operation procedure failed to establish reckless disregard because no provision prohibited officers from requesting a

boater pull to a safe area to conduct a traffic stop. *Miss. Dep't of Wildlife, Fisheries, & Parks v. Webb*, 248 So. 3d 823, 2017 Miss. App. LEXIS 217 (Miss. Ct. App. 2017), rev'd, 248 So. 3d 772, 2018 Miss. LEXIS 127 (Miss. 2018).

Circuit court improperly ruled for a family in their action against the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) because it erroneously applied the legal standard for reckless disregard under the Mississippi Torts Claim Act; MDWFP officers possessed the discretion to request that boaters pull out of the hazardous and high-traffic area of a river, and the MDWFP possessed the authority to regulate the boating traffic on the river and the discretion to do so in a safe manner. *Miss. Dep't of Wildlife, Fisheries, & Parks v. Webb*, 248 So. 3d 823, 2017 Miss. App. LEXIS 217 (Miss. Ct. App. 2017), rev'd, 248 So. 3d 772, 2018 Miss. LEXIS 127 (Miss. 2018).

Contractor's claim against a county engineer for tortious interference with a road construction contract implicated the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because the county engineer's responsibilities concerned the review, mitigation, and approval of alterations to the original construction contract. *Springer v. Ausbern Constr. Co.*, 231 So. 3d 1065, 2016 Miss. App. LEXIS 499 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

Mississippi Transportation Commission (MTC) was not immune under subsection (1)(p) because a widow did not claim that MTC's plans were deficient, but rather, she claimed that MTC's plans were not followed; the widow specifically argued that the construction plans incorporated the requirements of MTC's regulations and that MTC violated those requirements, but nothing in her complaint, pleadings, or arguments on appeal could be construed as a claim that MTC's plans were deficient. *Miss. Transp. Comm'n v. Adams*, 197 So. 3d 406, 2016 Miss. LEXIS 232 (Miss. 2016).

Although plaintiff argued that a medical center was required to have a thoracic surgeon on call 24 hours a day, seven days a week, the trial judge correctly applied the plain language of the Mississippi Tort

Claims Act when he concluded that the medical center could not be held liable for not devoting resources to attempting to hire additional thoracic surgeons. *Taylor v. Delta Reg'l Med. Ctr.*, 186 So. 3d 384, 2016 Miss. App. LEXIS 81 (Miss. Ct. App. 2016).

In a personal injury suit brought against a deputy sheriff and the county that employed him, the trial court did not err in finding that immunity under the Mississippi Tort Claims Act did not attach to the county because the deputy acted in reckless disregard for the safety of others by continuing to drive a vehicle that had been signaling that there were brake problems for several weeks and failing to properly resolve the brake issues. The deputy, being aware that the brake-warning light was still on in the vehicle during the weeks leading up to the accident, should not have continued driving the vehicle in a professional capacity. *Pearl River Cnty. v. Bethea*, 196 So. 3d 1012, 2015 Miss. App. LEXIS 627 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 616, 2016 Miss. LEXIS 307 (Miss. 2016).

Notwithstanding Miss. Code Ann. § 63-3-303, the act giving rise to the injuries in this case was not the placement or maintenance of a traffic-control device – but rather a Department of Transportation (DOT) employee's alleged negligent operation of a pickup truck; because the employee did not fall within the exceptions to Miss. Code Ann. § 63-3-205, and his duty to adhere to applicable traffic regulations was not discretionary, the circuit court erred in finding the DOT immune under Miss. Code Ann. § 11-46-9(1)(d). *Mixon v. Miss. DOT*, 183 So. 3d 90, 2015 Miss. App. LEXIS 313 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 52 (Miss. 2016).

School district was not immune from liability for injuries caused by a protruding conduit in the district's parking lot under the dangerous-condition exemption because (1) the protruding conduit was a dangerous condition on the school district's property, (2) substantial credible evidence supported the conclusion that the condition was not open and obvious, (3) there was substantial credible evidence that the school district had notice of

the condition before an injury, and (4) there was no evidence that the school district took any measures to warn people. *Natchez-Adams Sch. Dist. v. Bruce*, 168 So. 3d 1181, 2015 Miss. App. LEXIS 231 (Miss. Ct. App.), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 334 (Miss. 2015).

School district was not entitled to discretionary immunity from liability for injuries caused by a protruding conduit in the district's parking lot because Miss. Code Ann. § 37-7-301(d) imposed a ministerial duty on the district to repair the hazard. *Natchez-Adams Sch. Dist. v. Bruce*, 168 So. 3d 1181, 2015 Miss. App. LEXIS 231 (Miss. Ct. App.), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 334 (Miss. 2015).

School district was not entitled to summary judgment finding the district immune from liability for a student's injury, under Miss. Code Ann. § 11-46-9(1)(d)(v), because (1) a divider which fell and struck the student was vertically placed and left unsecured between doors frequently used by students, so the divider was a dangerous condition, and (2) evidence showed the district created the condition by leaving the divider unsecured. *K.N. v. Moss Point Sch. Dist.*, 167 So. 3d 1280, 2014 Miss. App. LEXIS 659 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 359 (Miss. 2015).

School district was not entitled to summary judgment finding the district immune from liability for a student's injury, under Miss. Code Ann. § 11-46-9(1)(d), because the district had a ministerial duty under Miss. Code Ann. § 37-7-301(d) to ensure a divider which fell and struck the student was properly replaced and secured. *K.N. v. Moss Point Sch. Dist.*, 167 So. 3d 1280, 2014 Miss. App. LEXIS 659 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 359 (Miss. 2015).

In suit by a tenant against the housing authority, the government entity that managed an apartment complex, the housing authority was entitled to sovereign immunity because it had no notice about the danger the light posed before it fell as the long-term maintenance supervisor and the property manager for almost two decades both testified they were not

aware of other light boxes falling before the tenant's; while the maintenance supervisor had previously replaced light boxes, he did not say it was because he knew they were too heavy, improperly installed or otherwise dangerous; and the fact a smaller, lighter fixture was put up after the other light fell did not prove the housing authority knew before the fixture fell that it was too heavy. *Serrano v. Laurel Hous. Auth.*, 151 So. 3d 256, 2014 Miss. App. LEXIS 661 (Miss. Ct. App. 2014).

School district was not entitled to summary judgment, based on governmental immunity, when an independent contractor fell through a hole in a catwalk above a high school stage and alleged that the district's negligent maintenance of the theater led to the contractor's injuries because the discretionary-function exemption did not bar the contractor's claim that the school district failed to carry out its duty to maintain the theater. *Calonkey v. Amory Sch. Dist.*, 163 So. 3d 940, 2014 Miss. App. LEXIS 499 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 238 (Miss. 2015).

School district was not entitled to summary judgment, based on governmental immunity, when an independent contractor fell through a hole in a catwalk above a high school stage and alleged that the district's negligent maintenance of the theater led to the contractor's injuries because the obvious-dangerous-condition exemption did not bar the contractor's claim that the school district's negligence led to the dangerous condition. *Calonkey v. Amory Sch. Dist.*, 163 So. 3d 940, 2014 Miss. App. LEXIS 499 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 238 (Miss. 2015).

Because there was substantial credible evidence that a school district had notice of a protruding conduit before plaintiff tripped over it, the circuit court did not abuse its discretion when it found that the district was not entitled to immunity under the Mississippi Tort Claims Act's dangerous-condition exemption. *Natchez-Adams Sch. Dist. v. Bruce*, 2014 Miss. App. LEXIS 485 (Miss. Ct. App. Sept. 9, 2014), op. withdrawn, sub. op., — So. 3d —, 2015 Miss. App. LEXIS 221 (Miss. Ct. App. Apr.

21, 2015), sub. op., 168 So. 3d 1181, 2015 Miss. App. LEXIS 231 (Miss. Ct. App. 2015).

State administrative agency was not liable when a claimant alleged that an employee of the agency falsely imprisoned the claimant in the lobby of a state office building because the agency was entitled to immunity for its employment of the employee under Miss. Code Ann. §§ 11-46-9(1)(d) and 11-46-9(1)(g). *Bell v. Miss. Dep't of Human Servs.*, 126 So. 3d 999, 2013 Miss. App. LEXIS 826 (Miss. Ct. App. 2013).

Where three drivers appealed the Miss. R. Civ. P. 12(b)(6) dismissal of their claim against the Mississippi Department of Transportation (MDOT) because of discretionary-function immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 65-1-65 required the MDOT to maintain and repair state highways, and the MDOT was not entitled to discretionary-function immunity for failure to properly maintain and repair highways because that function was ministerial. It was the function, not the act, to which the MTCA granted or denied immunity. *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Trial court erred in ruling that discretionary immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., barred a personal injury action, because a genuine issue of material fact existed as to whether a school district breached its duty of ordinary care in performing its ministerial duty to maintain discipline and to supervise the students, when one student assaulted another student, as required by the school district's handbook. *Swindle v. Neshoba County Sch. Dist.*, 137 So. 3d 869, 2013 Miss. App. LEXIS 574 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 235 (Miss. 2014).

There was no evidence the City caused or had actual notice of any loose dirt or gravel in the area where the pedestrian fell to support a claim under this section since: (1) there was no evidence that the parks and recreation director did not exercise reasonable care in inspecting the park on his daily inspections; (2) there were no complaints from park visitors

about the condition of the ground in the area; and (3) the pedestrian assumed that when her foot hit the loose gravel, the loose gravel made her slip. *Hawkins v. City of Morton*, 119 So. 3d 1104, 2013 Miss. App. LEXIS 278 (Miss. Ct. App. 2013).

City was entitled to summary judgment in an arrestee's claim for injury allegedly suffered during an arrest because, under Miss. Code Ann. § 11-46-9(1)(c), the city was immune unless the officer acted in reckless disregard of the safety and well-being of the arrestee, and the officer's actions did not rise to the level of reckless disregard; the officer's conduct was a reasonable precautionary measure in response to surrounding circumstances. When the arrestee deliberately disobeyed the his directive, the officer was forced to act for his safety and the safety of the arrestee. *City of Jackson v. Gardner*, 108 So. 3d 927, 2013 Miss. LEXIS 68 (Miss. 2013).

City was not liable for the death of a runaway at the hands of her boyfriend, as there was no showing that police officers violated the police department's policy by failing to ascertain that the child was a runaway minor and failing to take her into custody, or that they acted with reckless disregard for the child's safety and well-being. *City of Jackson v. Sandifer*, 107 So. 3d 978, 2013 Miss. LEXIS 60 (Miss. 2013).

City was not liable for its alleged failure to properly investigate a runaway's claim that she had sex with a police officer, because any failure by the city to properly investigate the officer constituted negligence, for which the city was not liable. *City of Jackson v. Sandifer*, 107 So. 3d 978, 2013 Miss. LEXIS 60 (Miss. 2013).

Provisions of Miss. Code Ann. § 11-46-9(1)(c), which provided government immunity for duties or activities related to police or fire protection, applied to a vehicle accident involving a Mississippi Forestry Commission employee who had fire suppression duties; the statute did not limit immunity to police officers and fire departments. *Herndon v. Miss. Forestry Comm'n*, 67 So. 3d 788, 2010 Miss. App. LEXIS 636 (Miss. Ct. App. 2010), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 380 (Miss. 2011).

Mississippi Transportation Commission was immune under Miss. Code Ann. § 11-46-9(1)(d) from liability for injuries suffered by a driver from a dead tree that fell on his car. There was no evidence that the dead tree was known about prior to the accident, and there was no requirement for inspecting trees along the highway. *Farris v. Miss. Transp. Comm'n*, 63 So. 3d 1241, 2011 Miss. App. LEXIS 158 (Miss. Ct. App. 2011), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

City was immune from homeowners' claims arising from sewer back-ups as a result of a city ordinance requiring larger sewer lines than were present on the homeowners' property because Jackson, Miss., Ordinances art. II, § 205(4) exempted the homeowners' subdivision from the ordinance, so the ordinance did not cause the city's maintenance of the city's sewage system to be a ministerial function. *Fortenberry v. City of Jackson*, 71 So. 3d 1196, 2011 Miss. LEXIS 88 (Miss. 2011).

City was immune from homeowners' claims arising from sewer back-ups because, if the city was otherwise liable for a discretionary decision resulting in damage, Miss. Code Ann. § 11-46-9(1)(d) shielded the city from liability. *Fortenberry v. City of Jackson*, 71 So. 3d 1196, 2011 Miss. LEXIS 88 (Miss. 2011).

Judgment dismissing appellant's negligence case under the Mississippi Tort Claims Act against the county was affirmed where (1) the County did provide adequate warning that the bridge was out; and (2) in addition to being under the influence of alcohol, appellant was an adult who knew the bridge was out prior to that date, and knowingly proceeded past warning signs and dirt barriers. *Martin v. Franklin County*, 29 So. 3d 862, 2010 Miss. App. LEXIS 124 (Miss. Ct. App. 2010).

State transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(v), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because under § 11-46-9(1)(v), there was no liability for

accidents caused by a dangerous condition that was open and obvious to one exercising due care, and the increased risk of hydroplaning in inclement weather was such an open and obvious risk. *Lee v. Miss. DOT*, 37 So. 3d 73, 2009 Miss. App. LEXIS 604 (Miss. Ct. App. 2009), cert. dismissed, 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

State transportation department was entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(q), for a lawsuit based on a vehicular collision occurring when a car hydroplaned in water pooled on a highway after a heavy rainstorm because under § 11-46-9(1)(q), there was no liability for accidents arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways, and the accident was solely caused by the inclement weather. *Lee v. Miss. DOT*, 37 So. 3d 73, 2009 Miss. App. LEXIS 604 (Miss. Ct. App. 2009), cert. dismissed, 34 So. 3d 1176, 2010 Miss. LEXIS 243 (Miss. 2010), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Legislature determined that it is necessary to protect governmental entities and their employees from liability for the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury, but the Legislature has not burdened non-governmental entities and private persons with liability for personal injuries sustained by an employee of a governmental entity when that person's actions fall somewhere in between simple negligence and the reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury. *Thompson v. Rizzo Farms, Inc.*, 27 So. 3d 452, 2009 Miss. App. LEXIS 568 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 67 (Miss. 2010).

Trial court did not apply an incorrect standard of care for comparative negligence when it failed to require an em-

ployee to show that a county sheriff's deputy acted with reckless disregard because the deputy was not afforded the protection provided by Miss. Code Ann. § 11-46-9(1)(c) when his personal injury suit against the employer, a non-governmental entity, was not a claim as defined under Miss. Code Ann. § 11-46-1(a); § 11-46-9(1)(c) limits liability, not fault, when a plaintiff files suit against a governmental entity, and there was no reason why it should prohibit the allocation of fault when an employee of the governmental entity files suit against a non-governmental entity. *Thompson v. Rizzo Farms, Inc.*, 27 So. 3d 452, 2009 Miss. App. LEXIS 568 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 67 (Miss. 2010).

Where an inmate sued prison officials for allegedly denying his visitation privileges, Miss. Code Ann. § 11-46-9(1)(m) provided the officials with immunity from the inmate's claim for monetary damages; however, the prison officials were not immune from the inmate's request for injunctive relief. The trial court erred by dismissing that claim under the Mississippi Tort Claims Act. *Roland v. Epps*, 10 So. 3d 972, 2009 Miss. App. LEXIS 237 (Miss. Ct. App. 2009).

City and gym were immune under Miss. Code Ann. § 11-46-9 with regard to a mother's personal injury action arising out of the injuries of a minor child who fell through a ceiling at the gym because the mother failed to prove that the child's injury was caused by dangerous condition, to show that the city or the gym had actual or constructive notice that the child had climbed into the false ceiling and was in danger of falling to the floor, or to show that there was adequate time to protect or warn against danger. *Kaigler v. City of Bay St. Louis*, 12 So. 3d 577, 2009 Miss. App. LEXIS 380 (Miss. Ct. App. 2009).

Where an inmate sued prison officials for allegedly denying his visitation privileges, Miss. Code Ann. § 11-46-9(1)(m) provided the officials with immunity from the inmate's claim for monetary damages; however, the prison officials were not immune from the inmate's request for injunctive relief. The trial court erred by dismissing that claim under the Mississippi Tort Claims Act. *Roland v. Epps*, 10

So. 3d 972, 2009 Miss. App. LEXIS 237 (Miss. Ct. App. 2009).

Officer's behavior did not constitute reckless disregard under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c), where the officer's actions would not have been reasonably foreseeable by the owner; based on the totality of the circumstances, the officer's conduct was a reasonable reaction to what he perceived to be a potentially dangerous situation, and the finding that the officer's conduct failed to rise to the level of reckless disregard was sufficient to dispose of the resident's contentions that the officer's actions were unwarranted and excessive. *Scott v. City of Goodman*, 997 So. 2d 270, 2008 Miss. App. LEXIS 783 (Miss. Ct. App. 2008).

Dismissal of an inmate's case arising from an assault by a fellow prisoner was proper because there was immunity under Miss. Code Ann. § 11-46-9(1)(m), and there was no showing of deliberate indifference in relation to claims of an alleged failure to protect and an alleged failure to provide adequate medical treatment. No hearing was warranted because it was clear from the record that the inmate was not entitled to any relief. *Clay v. Epps*, 19 So. 3d 743, 2008 Miss. App. LEXIS 565 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 158 (Miss. 2009).

Trial court properly dismissed a student's negligence action against a school system for failure to protect the student from harassment by fellow students where the system exercised ordinary care and conducted a reasonable investigation into the alleged incidents of harassment; hence, the system was immune from any liability pursuant to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(b). *Beacham v. City of Starkville Sch. Sys.*, 984 So. 2d 1073, 2008 Miss. App. LEXIS 368 (Miss. Ct. App. 2008).

With respect to an accident victim's Mississippi Tort Claims Act suit against a county arising from an automobile accident with a county sheriff's deputy, a trial court properly granted summary judgment to the county because the victim failed to establish that the deputy acted recklessly, rather than negligently, when

backing his vehicle out of a parking space. *Vo v. Hancock County*, 989 So. 2d 414, 2008 Miss. App. LEXIS 292 (Miss. Ct. App. 2008).

Mississippi Department of Transportation (MDOT) was entitled to summary judgment in the injured driver's suit for damages arising out of a car accident that occurred while the highway was being refurbished. The injured driver did not put forward evidence that MDOT had notice of any defective condition; therefore, MDOT was immune from liability under Miss. Code Ann. § 11-46-9. *Frazier v. Miss. DOT*, 970 So. 2d 221, 2007 Miss. App. LEXIS 810 (Miss. Ct. App. 2007).

Inmate was incarcerated when the inmate filed a complaint against numerous governmental entities and employees; those governmental entities and employees were immune from the inmate's lawsuit and the chancellor properly dismissed the inmate's complaint. *Bessent v. Clark*, 974 So. 2d 928, 2007 Miss. App. LEXIS 633 (Miss. Ct. App. 2007).

In a 42 U.S.C.S. § 1983 case against a city that also alleged state tort claims, since the facts as set forth in the complaint did not rise to level of reckless disregard, a city was not liable under the Mississippi Tort Claims Act. *Bynum v. City of Magee*, 507 F. Supp. 2d 627, 2007 U.S. Dist. LEXIS 61035 (S.D. Miss. 2007).

In a child's suit against the Mississippi Department of Human Services (DHS), failure to investigate a child's allegations of sexual abuse by an employee of a youth care facility was a ministerial act for which DHS could be held liable. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253, 2007 Miss. App. LEXIS 503 (Miss. Ct. App. 2007).

Trial court erred in granting a sheriff, county, and surety summary judgment on an individual's claims of false imprisonment and negligence where the individual raised issues of fact as to whether the sheriff or his deputies complied with their duties in accepting surrender from a bail bondsman, and whether they evinced a reckless disregard for the individual's safety and well-being in accepting his surrender. *Brooks v. Pennington*, 995 So. 2d 733, 2007 Miss. App. LEXIS 378 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 680 (Miss. Dec. 4, 2008).

Trial court erred by holding that the city was immune from liability under Miss. Code Ann. § 11-46-9(1)(d), and therefore it erred by granting the city summary judgment because the trial court failed to consider the second prong of the public policy test, which required that the choice involved social, economic, or political policy. *Willing v. Estate of Benz*, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was entitled to immunity under the mob exemption under Miss. Code Ann. § 11-46-9(1)(u), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because: (1) the actions of the angry crowd of teenagers constituted a riot, as the party guest testified that there were at least 15 people assembled on the night in question, all angry with the party guest and attempting to seriously injure or kill him by wielding knives and throwing sticks and bricks at him; and (2) the bystander who stole the officer patrol car and struck the party guest with it was part of the rioting mob, and therefore the party guest's claim arose out of and resulted from the riot. *Chapman v. City of Quitman*, 954 So. 2d 468, 2007 Miss. App. LEXIS 176 (Miss. Ct. App. 2007).

Trial court erred by granting the city summary judgment under the discretionary function exemption under Miss. Code Ann. § 11-46-9(1)(d) because the trial court applied only the first prong of the public policy function test rather than both prongs. *Chapman v. City of Quitman*, 954 So. 2d 468, 2007 Miss. App. LEXIS 176 (Miss. Ct. App. 2007).

Summary judgment was properly granted to a county based on sovereign immunity under Miss. Code Ann. § 11-46-9(1)(d) because the decision to backfill a road instead of paving it after the upgrade or installation of a culvert was a discretionary function; even though the failure to place a warning sign was a ministerial function, there was no liability for the county because the condition of the roadway, and not the failure to place the sign, was the cause of the accident. *Barr v. Hancock County*, 950 So. 2d 254, 2007 Miss. App. LEXIS 109 (Miss. Ct. App. 2007).

Trial court properly granted summary judgment to a county constable under Miss. R. Civ. P. 56 in a personal injury suit because the constable had immunity, under Miss. Code Ann. § 11-46-9(1)(c), for injuries to a father, which occurred when the constable's car collided with his four-wheeler, because there was significant evidence that the father was engaged in criminal activity that had a causal nexus to the accident; the father was driving on a suspended license and pled guilty to reckless driving, however summary judgment against the father's sons was improper because genuine issues of fact existed as to whether the sons were engaged in criminal activity, whether any criminal activity on the part of the sons had a causal nexus to the accident, and whether the constable acted with reckless disregard in his pursuit of appellants. *Giles v. Brown*, 962 So. 2d 612, 2006 Miss. App. LEXIS 930 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 477 (Miss. 2007).

Summary judgment was properly granted to a city in a negligence case based on a fall from a raised sidewalk crack because the city had immunity under Miss. Code Ann. § 11-46-9(1)(v); the city did not have a duty to maintain the sidewalks in a perfect condition, it did not have notice, and the open and obvious defense applied. *Howard v. City of Biloxi*, 943 So. 2d 751, 2006 Miss. App. LEXIS 893 (Miss. Ct. App. 2006).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q), and therefore it was properly granted summary judgment in the family's wrongful death action, because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch on the highway. *Willing v. Benz*, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), sub. op., op. withdrawn, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c), and therefore it was properly granted summary judgment in the family's wrongful death action, because the officer's conduct

did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. *Willing v. Benz*, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), sub. op., op. withdrawn, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. *City of Jackson v. Presley*, 942 So. 2d 777, 2006 Miss. LEXIS 649 (Miss. 2006).

Trial court did not err in finding that the Mississippi Department of Transportation (MDOT) was immune from liability for a traffic accident pursuant to Miss. Code Ann. § 11-46-9(1) as credible evidence supported the court's finding that the parents of an infant who died from the injuries she received in the collision had failed to prove that the MDOT had had notice of a dangerous condition at the intersection, at least prior to the instant accident. *Reeves v. Miss. DOT*, 941 So. 2d 884, 2006 Miss. App. LEXIS 821 (Miss. Ct. App. 2006).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium was appropriate pursuant to Miss. Code Ann. § 11-46-9(1)(v) because the coal grate at issue was a dangerous condition. *City of Natchez v. Jackson*, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 (Miss. Ct. App. 2006).

Department of mental health was found liable for negligence because a psychiatric hospital owed a duty of care to, inter alia, monitor the patient, and an injury during an escape was foreseeable. Immunity under Miss. Code Ann. § 11-46-9(d) did not apply either because the duties owed were

not discretionary based on Miss. Code Ann. § 41-21-102(6). *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the court could not find that the officer recklessly disregarded the passengers' safety when considering the totality of the circumstances; evidence showed, inter alia, that: (1) the driver's flight from the police lasted for a matter of minutes over five miles; (2) the flight did not occur on a residential street or within a residential neighborhood; (3) there was little or no testimony regarding the characteristics of the streets on which the flight took place; (4) traffic was light; (5) the weather was sunny and clear; and (6) the driver was operating a stolen vehicle with a suspended license and the officer noticed him because of his excessive speed and reckless driving. *McCoy v. City of Florence*, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the passengers were engaged in criminal activity, as there was no dispute that they knew that the car was stolen and that they encouraged the driver to flee from the police, in violation of Miss. Code Ann. § 97-35-7(2). *McCoy v. City of Florence*, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a county and a city were properly granted summary judgment because neither were involved in the pursuit. *McCoy v. City of Florence*, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Dismissal of the decedent's mother's and a student's action against a state

university resulting from a shooting on campus was appropriate under Miss. Code Ann. § 11-46-9(1)(v) where the underlying act of the claims was the fact that the gunman shot the victims; they cited no authority suggesting that the university, through an employee, had a duty to warn the victims of the dangerous conditions of the gunman's character. *Johnson v. Alcorn State Univ.*, 929 So. 2d 398, 2006 Miss. App. LEXIS 406 (Miss. Ct. App. 2006).

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity as Miss. Code Ann. § 11-46-5(1) permitted school districts to be sued. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 2006 U.S. App. LEXIS 21259 (5th Cir. Miss. 2006).

Summary judgment was properly awarded to a county medical center in plaintiff's negligence action where the medical center was immune from liability under Miss. Code Ann. § 11-46-9(1)(v); there was no evidence that the medical center caused the dangerous condition of a chair-bed that collapsed when plaintiff sat on it. *Hodges v. Madison County Med. Ctr.*, 929 So. 2d 381, 2006 Miss. App. LEXIS 391 (Miss. Ct. App. 2006).

Summary judgment was granted to a police officer and a city in a personal injury case arising from an arrest because the evidence did not show that the officer acted with reckless disregard under Miss. Code Ann. § 11-46-9(1)(c); an arrestee only complained once that handcuffs were too tight, and there was no evidence of

medical bills or lost wages. *Bradley v. McAllister*, 929 So. 2d 377, 2006 Miss. App. LEXIS 387 (Miss. Ct. App. 2006).

Mississippi Department of Wildlife, Fisheries, and Parks should have been granted immunity under Miss. Code Ann. § 11-46-9(1)(v) because there was insufficient evidence to establish that there was a dangerous condition on the Department's property of which it had constructive notice and time to correct or warn against. There was no evidence that the Department had prior notice of the drop-off where the visitor fell, which the trial court found was covered by leaves and pine straw; there was no evidence that the Department failed to exercise reasonable care in its inspections of the roadways, as a risk management supervisor testified that he inspected the park about a month before the visitor's fall and found no drop-offs that needed to be corrected. *Miss. Dep't of Wildlife, Fisheries & Parks v. Brannon*, 943 So. 2d 53, 2006 Miss. App. LEXIS 204 (Miss. Ct. App. 2006).

Appellate court affirmed the grant of summary judgment in favor of a county in wrongful death action brought by the personal representative of the decedent who was an inmate when he was killed in an accident after having volunteered for garbage detail because Miss. Code Ann. § 11-46-9(1)(m) specifically precluded state tort claims by inmates. *Powell v. Clay County Bd. of Supervisors*, 924 So. 2d 523, 2006 Miss. LEXIS 112 (Miss. 2006).

Judgment was properly awarded to the Mississippi Transportation Commission (MTC) in plaintiff's negligence action under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9, where substantial evidence showed that the MTC had no notice of a defective shoulder, plaintiff produced no evidence showing that the defect was noticeable upon passing, and there was no evidence that any verbal or written complaints were filed prior to plaintiff's collision with another vehicle. *Jones v. Miss. Transp. Comm'n*, 920 So. 2d 516, 2006 Miss. App. LEXIS 69 (Miss. Ct. App. 2006).

Summary judgment was granted in favor of defendant city and police officers in a 42 U.S.C.S. § 1983 suit alleging false arrest and imprisonment, malicious pros-

ecution, and intentional and/or negligent infliction of emotional distress filed by two citizens arrested for an arson/murder but later exonerated; although the officers could have done a more thorough investigation at the scene, they did not act recklessly under Miss. Code Ann. § 11-46-9(1)(c). *Mitchell v. City of Jackson*, 481 F. Supp. 2d 586, 2006 U.S. Dist. LEXIS 95887 (S.D. Miss. 2006), *aff'd*, 223 Fed. Appx. 411, 2007 U.S. App. LEXIS 6889 (5th Cir. Miss. 2007).

Where an assistant district attorney was acting in the scope of her employment by providing police with identifying information regarding a person who had committed the crime of false pretenses, even though the information was incorrect, there was no liability under Miss. Code Ann. § 11-46-9(1)(d). *Stewart v. DA*, 923 So. 2d 1017, 2005 Miss. App. LEXIS 589 (Miss. Ct. App. 2005), *cert. denied*, 927 So. 2d 750, 2006 Miss. LEXIS 161 (Miss. 2006).

Bridge contractor was hired by Mississippi Department of Transportation as an independent contractor, and under the language of the contract, said contractor bore responsibility for the signage at the construction site; however, under the Mississippi Torts Claim Act, Miss. Code Ann. § 11-46-1 *et seq.*, MDOT could have still been liable under the narrow exceptions of Miss. Code Ann. § 11-46-9(1)(p) and (v), if MDOT had notice of the dangerous condition, and MDOT had adequate opportunity to protect or warn against the dangerous condition; in the latter respect, in the case at bar, MDOT's liability for the lack of warning signs and other measures at the bridge construction site was a question of fact, where it was clear that an MDOT representative made frequent visits to the construction site, and it was clear that at least on one occasion, MDOT requested that the contractor install additional warning devices. *Chisolm v. Miss. DOT*, 942 So. 2d 165, 2005 Miss. App. LEXIS 560 (Miss. Ct. App. 2005), *rev'd*, 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Under Miss. Code Ann. § 11-46-9(1)(v), the Mississippi Department of Transportation (MDOT) and its employees could not be liable for any claim resulting from a

dangerous condition on the State's property if: (1) that condition was not caused by the negligence or wrongful conduct of the employee, or (2) MDOT lacked notice and an adequate opportunity to warn of the dangerous condition. However, in the case at bar, based on testimony of MDOT employees, the appellate court found that there were clearly issues of fact for the jury as far as MDOT's notice of a dangerous condition at the bridge construction site, and MDOT's opportunity to have warned or protected against the condition; thus, in the suit by the heirs of the decedent who was killed at said construction site, summary judgment for the MDOT was improper. *Chisolm v. Miss. DOT*, 942 So. 2d 165, 2005 Miss. App. LEXIS 560 (Miss. Ct. App. 2005), *rev'd*, 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Mississippi county was fraudulently joined in a suit, arising out of a fatal car accident because: (1) the county did not have any legal responsibility with regard to the posting of a stop sign at the intersection where the accident occurred, (2) Miss. Code Ann. § 63-3-305 granted discretionary authority to the county to place and maintain traffic control devices upon highways within the county, (3) under Miss. Code Ann. § 11-46-9(1)(d), the county could not be held liable for its exercise of discretionary power under Miss. Code Ann. § 63-3-305, even if an abuse of discretion was shown, and (4) although there was precedent under Mississippi law to hold municipalities liable, either under Miss. Code Ann. § 11-46-9(1)(b) or (1)(w), for failing to warn about known dangerous conditions on roads, no reasonable factfinder would find that the motorist who caused the accident was not adequately warned about the approaching intersection. *Dozier v. Hinds County*, 379 F. Supp. 2d 834, 2005 U.S. Dist. LEXIS 15666 (S.D. Miss. 2005).

Trial court had not committed reversible error by failing to find it immune from liability under Miss. Code Ann. § 11-46-9(1)(c) because the person who brought a suit against the city and police officers was contemporaneously engaged in criminal activity because the crimes for which he was charged and convicted ceased prior to the delivery of the offensive blows by

the officers. His attempt to resist arrest ended, at the latest under the facts of the instant case, when he was handcuffed. *City of Jackson v. Powell*, 917 So. 2d 59, 2005 Miss. LEXIS 755 (Miss. 2005).

Although a trial court had not erred when it held that a city was not liable for the acts of two police officers during and after an arrest of an African-American male because the officers had acted beyond the scope of their employment, the court erred when it found the city liable because it had negligently supervised the officers. There was not a scintilla of evidence presented to indicate that the city had any policy which encouraged the type of activity that the officers engaged in and there was no factual support for the factual holding that the city was deliberately indifferent to the rights of African-Americans. *City of Jackson v. Powell*, 917 So. 2d 59, 2005 Miss. LEXIS 755 (Miss. 2005).

Appellate court affirmed grant of summary judgment in favor of the county because the testimony of the individual and a third party was sufficient to establish that dense fog was the sole proximate cause of the accident, and thus, the county was entitled to immunity under Miss. Code Ann. § 11-46-9 (1)(q). *Hayes v. Greene County*, 932 So. 2d 831, 2005 Miss. App. LEXIS 774 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 521 (Miss. 2006).

Teacher's aide was walking side-by-side with an autistic child when the child had an anxiety attack, and during said anxiety attacks, it was common for the child to become violent with other children and to hit them. During the particular anxiety attack, the child was running into walls and tables, and for those reasons, the aide was required to act quickly in order to prevent the child from hurting himself or others; under those circumstances, the aide took reasonable steps to minimize the risk of harm to the child who suffered bruises during the incident and the child's parents were not entitled to damages on grounds of school district negligence. *Pigford v. Jackson Pub. Sch. Dist.*, 910 So. 2d 575, 2005 Miss. App. LEXIS 90 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 545 (Miss. 2005).

When a teacher's aide was escorting the autistic child to his classroom, the child

became agitated while he aide continued to move him through the hallway. The child suffered bruises as a result of the teacher's aide's fully sensible attempts to restrain him, and no treatment or medication was warranted or prescribed for said bruises; the aide's restraint of the child constituted control and discipline under Miss. Code Ann. § 37-11-57, and the circuit court properly applied Miss. Code Ann. § 11-46-9(1)(x) in finding that said actions did not constitute wanton and willful conduct to allow the parents to recover damages. *Pigford v. Jackson Pub. Sch. Dist.*, 910 So. 2d 575, 2005 Miss. App. LEXIS 90 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 545 (Miss. 2005).

Paramedic testified that the "hallmark signs" of a placental abruption, excruciating pain and excessive bleeding, were not present, and both paramedics testified that they did not see blood. The pregnant employee testified that blood was not found because her co-workers had wiped the blood from the floor, but the trial court properly found that since neither paramedic testified that they saw blood, then it could only find such a decision to be discretionary; therefore, given that the employee's condition was abnormal, whether to have treated the situation as a "load and go" required the paramedics to use their own judgment, the trial court correctly deemed the paramedic's decision as discretionary, and it correctly granted the city's motion to dismiss the wrongful death action under Miss. R. Civ. P. 41(b). *Sanders v. Riverboat Corp.*, 913 So. 2d 351, 2005 Miss. App. LEXIS 272 (Miss. Ct. App. 2005).

Husband's claims against his employer's personnel officers were properly dismissed because officers, as employees of a state prison, were acting within the scope of their employment when they collected insurance premiums while wife's life insurance application, which was ultimately denied, was pending. *Smith v. Med. Life Ins. Co.*, 910 So. 2d 48, 2005 Miss. App. LEXIS 52 (Miss. Ct. App. 2005).

Absent evidence showing otherwise, state environmental agencies and their employee were immune to landowners' claims of tortious interference with con-

tract and business relations concerning the development of protected wetlands that belonged to the landowners. *Dunston v. Miss. Dep't of Marine Res.*, 892 So. 2d 837, 2005 Miss. App. LEXIS 66 (Miss. Ct. App. 2005).

In a citizen's excessive force action, substantial evidence supported the circuit court's finding that the city was liable for the citizen's injuries pursuant to Miss. Code Ann. § 11-46-9(1)(c) because the police officers' actions were not reasonable or in good faith, and the citizen was not engaged in criminal conduct at the time of his injuries. The record showed that the citizen had been arrested for resisting arrest and disorderly conduct, was handcuffed and in submission, and that one officer ground the citizen's face into the concrete garage floor, causing his teeth to break. *City of Jackson v. Calcote*, 910 So. 2d 1103, 2005 Miss. App. LEXIS 49 (Miss. Ct. App. 2005).

In a family's suit following a car accident, summary judgment in favor of the department of transportation, the county, and the engineer was proper as the family failed to produce sufficient evidence to establish that the last inspection by the department was negligently performed, or that the county or the engineer negligently inspected and maintained the culvert. *Jenkins v. Miss. DOT*, 904 So. 2d 1207, 2004 Miss. App. LEXIS 1050 (Miss. Ct. App. 2004).

Contractor had not presented any evidence that the Mississippi Department of Transportation (MDOT) was entitled to immunity from liability based upon the exemption set forth in Miss. Code Ann. § 11-46-9, and MDOT could not be deemed to have been fraudulently joined in the action based upon an alleged exemption under § 11-46-9. *Johnson v. James Constr. Group, LLC*, 306 F. Supp. 2d 654, 2004 U.S. Dist. LEXIS 2597 (S.D. Miss. 2004).

Dismissal of an inmate's claim against the employees of the Missouri Department of Corrections was proper where the employees were acting within the course and scope of their employment; the inmate's negligence action was barred by the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., 11-46-9

(1)(m). *Whitt v. Gordon*, 872 So. 2d 71, 2004 Miss. App. LEXIS 56 (Miss. Ct. App. 2004).

Deputy responding to a call from a fellow officer was not speeding and did not sound a siren because the deputy did not want there to be any accidents resulting from motorists coming to an abrupt stop, and while the deputy failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of the deputy, the deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others or a willingness that harm should follow; thus, summary judgment for the county was proper. *Kelley v. Grenada County*, 859 So. 2d 1049, 2003 Miss. App. LEXIS 1080 (Miss. Ct. App. 2003).

In a slip and fall case, the trial court erred in not granting the city immunity under Miss. Code Ann. § 11-46-9(1)(v) as the injured patient admitted that the steps and ramp outside the municipal building where he fell were covered with enough snow and ice for anyone to see and that he wasn't paying attention as he left the building holding his money and a receipt. *City of Clinton v. Smith*, 861 So. 2d 323, 2003 Miss. LEXIS 550 (Miss. 2003).

In a wrongful death suit, as Miss. Code Ann. § 11-46-9(1)(m) applied to any non-intentional/non-criminal acts alleged to have been committed upon a deceased inmate by a sheriff and/or his deputies while in the course and scope of their employment, the trial court correctly dismissed claims alleging negligent acts by defendants and properly left an assault claim viable; however, it erred by dismissing other counts that alleged intentional criminal acts, as pursuant to Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2), these claims remained viable under the wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 2003). *Lee v. Thompson*, 859 So. 2d 981, 2003 Miss. LEXIS 407 (Miss. 2003).

Before municipal officials could be found negligent, thereby entitling a plaintiff to recover, the plaintiff had to show the existence of a legal duty owed to him by the municipal officials; any assertion that

the municipal officials breached a duty to the decedent because they failed to guarantee his safety and well-being was unrealistic and untenable, given that the municipal officials were not present when the threat on the decedent's life was made, and the municipal officials, acting in their individual capacity, owed no duty to the decedent. *Dependants of Reid v. City of Canton*, 858 So. 2d 163, 2003 Miss. App. LEXIS 912 (Miss. Ct. App. 2003).

Trial court properly ruled that the Mississippi Department of Transportation (MDOT) was not immune from suit under Miss. Code Ann. § 11-46-9, as it found that, while MDOT's duty to inspect and maintain a highway where plaintiff's accident occurred was discretionary, it failed to exercise a minimum standard of ordinary care when it did not give notice of the dangerous condition of the highway. *Miss. DOT v. Cargile*, 847 So. 2d 258, 2003 Miss. LEXIS 255 (Miss. 2003), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 2011 Miss. LEXIS 609 (Miss. Oct. 20, 2011), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012), overruled, *Little v. Miss. DOT*, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Though the Mississippi Department of Transportation was not immune from suit, as the trial court properly found that a five to six inch drop-off on the shoulder of a road was a dangerous condition that was not obvious, which was created by the negligence of the Department and of which the Department knew but failed to warn against, the trial court erred by not assessing some degree of fault to plaintiff driver, who had been obliged to exercise vigilant caution when she learned the road was under construction. *Miss. DOT v. Trosclair*, 851 So. 2d 408, 2003 Miss. App. LEXIS 666 (Miss. Ct. App. 2003).

Where an individual worked for the Mississippi Bureau of Narcotics making drug buys, and was caught in the crossfire between a dealer and a Bureau officer, each factual allegation made by the individual to support the individual's claim of breach of contract amounted to mere negligence; the individual did not claim the Bureau acted with "dishonest purpose or moral obliquity," but claimed the Bureau

made a series of bad choices, and that was insufficient on its face to constitute a breach of an implied covenant of good faith and fair dealing. *Lippincott v. Miss. Bureau of Narcotics*, 856 So. 2d 465, 2003 Miss. App. LEXIS 282 (Miss. Ct. App. 2003).

Where an individual worked for the Mississippi Bureau of Narcotics making drug buys, and was caught in the crossfire between a dealer and a Bureau officer, all the individual was able to show with regard to his negligence claim, was that the Bureau and its agents made a series of challengeable choices, from the level of training before sending an officer on a drug buy, to the directions given that officer; bad judgment, however, was insufficient for liability where the individual offered no evidence to meet the evidentiary burden of the reckless disregard standard. *Lippincott v. Miss. Bureau of Narcotics*, 856 So. 2d 465, 2003 Miss. App. LEXIS 282 (Miss. Ct. App. 2003).

Parolee fell under Miss. Code Ann. § 47-7-71(1) of the Uniform Act for Out-of-State Parolee Supervision because the parolee's parents lived in the state and the parolee indicated that parolee had a job in the state, and thus the State's acceptance of the parolee under the Act was proper and mandatory; because there was nothing in the Act or the state corrections department regulations that required a field officer to revoke one's parole, the officer's decision not to revoke the parole after the parolee failed to timely report was an exercise of discretion, and because (1) there was no evidence of a gross, reckless, or wanton failure in the State's supervision of the parolee, and (2) there was no sufficient causal connection or element of foreseeability between the alleged violated statutory duty and the injuries sustained by the victim when raped by a parolee, the State maintained the benefit of immunity under Miss. Code Ann. § 11-46-9(1) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., and the State was properly granted summary judgment in the victim's action for damages. *Connell v. State*, 841 So. 2d 1127, 2003 Miss. LEXIS 147 (Miss. 2003), op. withdrawn, 2003 Miss. LEXIS 625 (Miss. Nov. 6, 2003), sub. op., 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

Victim's one-year window under Miss. Code Ann. § 11-46-11(3) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to et seq., to file a notice of claim against the State for damages related to the victim's rape by a parolee did not begin to run until the day the victim was raped, and the victim's notice of claim and complaint were timely filed, although the court ultimately found the State immune from liability under Miss. Code Ann. § 11-46-9(1). *Connell v. State*, 841 So. 2d 1127, 2003 Miss. LEXIS 147 (Miss. 2003), op. withdrawn, 2003 Miss. LEXIS 625 (Miss. Nov. 6, 2003), sub. op., 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

City was liable for the wrongful death of a driver under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., because several officers acted in reckless disregard of the safety of the driver when they initiated a police chase in violation of department policy. *City of Jackson v. Brister*, 838 So. 2d 274, 2003 Miss. LEXIS 79 (Miss. 2003).

Where driver merely alleged a police officer negligently collided with her vehicle, it was insufficient to defeat an immunity-based defense on summary judgment under Mississippi tort claims act because the driver failed to prove the act was willful or wanton or otherwise exhibited a reckless disregard for the safety and well being of others. *Bonner v. McCormick*, 827 So. 2d 39, 2002 Miss. App. LEXIS 521 (Miss. Ct. App. 2002).

In an action arising from an injury sustained by the plaintiff when a fight broke out at a high school basketball game, remand to the trial court was necessary because the trial court made no reference to ordinary care in its findings of fact and conclusions of law as to whether the defendant school district was immune from liability. *Pearl Pub. Sch. Dist. v. Groner*, 784 So. 2d 911, 2001 Miss. LEXIS 94 (Miss. 2001).

The defendant city and police officers were immune from liability for injuries sustained by the plaintiff when he lost control of his vehicle while being pursued by police officers for traffic violations since it did not appear that the officers intentionally chased after the plaintiff in such a

way as to frighten him and cause him to wreck his vehicle and since the plaintiff was engaged in criminal activity at the time of his accident, based on his possible speeding, his failure to yield to the blue lights, and his driving with a suspended license. *Topps v. City of Hollandale*, 2000 U.S. Dist. LEXIS 9925 (N.D. Miss. June 30, 2000).

A county may be held liable under subsection (1)(h) for damages for issuing a permit to perform work when it knows that the applicant who proposes to do the work is not duly licensed to perform the work in question since such conduct is arbitrary and capricious conduct violative of a statutory mandate. *Lowe v. Lowndes County Bldg. Inspection Dep't*, 760 So. 2d 711, 2000 Miss. LEXIS 66 (Miss. 2000).

A police officer who was struck by an automobile while riding a motorcycle and leading a funeral procession was barred from bringing suit against the defendant city and the defendant automobile driver (who was another police officer) as he was employed by a governmental entity and received worker's compensation benefits provided by that entity. *Leslie v. City of Biloxi*, 758 So. 2d 430, 2000 Miss. LEXIS 87 (Miss. 2000).

Sovereign immunity was not an absolute bar to an action against a defendant school district for failing to act after a student told a teacher of a threat by another student; public schools have a ministerial responsibility to insure a safe school environment under § 37-9-69 and should take reasonable steps to minimize risks to students. *L.W. v. McComb Separate Mun. Sch. Dist.*, 1999 Miss. LEXIS 128 (Miss. Mar. 31, 1999), op. withdrawn, sub. op., 754 So. 2d 1136, 1999 Miss. LEXIS 273 (Miss. 1999).

The purchase of insurance by a school district under § 11-46-17(4) does not limit the exclusions or exemptions enumerated in this section. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136, 1999 Miss. LEXIS 273 (Miss. 1999), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 2011 Miss. LEXIS 609 (Miss. Oct. 20, 2011), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012).

OPINIONS OF THE ATTORNEY GENERAL

Municipality does not have authority to waive immunity set forth in Section 11-46-1, et seq., by agreeing to indemnify railroad for claims; municipality does not have authority to agree to indemnify railroad for losses relating to use of license or arising from same location; city has authority to maintain shrubbery and vegetation on municipal property, but does not have authority to maintain shrubbery and vegetation on private property, such as railroad right-of-way. Scott Nov. 3, 1993, A.G. Op. #93-0727.

Members of Foster Care Review Board enjoy public official immunity for any of their acts arising out of and within course and scope of their duties on Board pursuant to Section 11-46-9 provided that conduct does not constitute fraud, malice, libel, slander, defamation or criminal offense. Tardy, Jan. 5, 1994, A.G. Op. #93-0972.

Section 11-46-9 would bar payment of damages to property seized unless the detention of the property was arbitrary or capricious. In addition, there is a one year statute of limitations under Section 11-46-11. Walters, March 29, 1996, A.G. Op. #96-0146.

Section 11-46-9(1) provides that a governmental entity and its employees shall not be liable for any claim "arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work." An adjudication of delinquency by the Youth Court might not rise to the level of a criminal conviction. Trapp, July 8, 1996, A.G. Op. #96-0398.

Municipalities may insure themselves only for claims for which they are liable; the police and fire protection exemption specifically bars claims against municipi-

palities and the city of Jackson may not gratuitously provide coverage. Tedder, March 13, 1998, A.G. Op. #98-0133.

If the Mississippi Department of Transportation denies an access permit to a state highway under its police power and the denial effectively prohibits ingress and egress to the individual requesting the permit, an aggrieved individual may seek judicial review of the denial of the permit; however, absent malicious, arbitrary, or capricious conduct, the denial of a permit is a legitimate exercise of police power by the Mississippi Department of Transportation. Brown, Mar. 22, 2002, A.G. Op. #02-0121.

Damages will not ordinarily lie against the Mississippi Department of Transportation or their employees for the denial of a permit for ingress and egress in cases to a state highway where there is no pre-existing right. Brown, Mar. 22, 2002, A.G. Op. #02-0121.

Employees acting within the scope and course of their employment are covered by the Tort Claims Act for breaches of fiduciary or administrative duties sounding in tort that are discretionary in nature; the same is not true regarding ministerial acts. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

The sheriff of the county of conviction, and/or where an inmate will be during temporary leave is exempt under the Mississippi Tort Claims Act from any legal liability as long as the sheriff is acting in the scope of his duties and shows no reckless disregard of the safety and well-being of any person not engaged in criminal activity. Trowbridge, Nov. 14, 2005, A.G. Op. 05-0472.

The basic common law immunity from liability for good faith actions still exists, except where modified by the Tort Claims Act. Mitchell, Sept. 29, 2006, A.G. Op. 06-0454.

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death caused by action or inaction of off-duty police officer. 36 A.L.R.5th 1.

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local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

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Claims arising from governmental conduct causing damage to plaintiff's real property as within discretionary function exception of federal tort claims act (28 U.S.C.S. § 2680(a)). 167 A.L.R. Fed. 1.

Liability of United States for failure to warn of danger or hazard not directly created by act or omission of federal government and not in national parks as affected by "discretionary function or duty" exception to Federal Tort Claims Act. 169 A.L.R. Fed. 421.

Liability of United States for failure to warn of danger or hazard resulting from governmental act or omission as affected by "discretionary function or duty" exception to Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 170 A.L.R. Fed. 365.

Liability of United States for failure to warn local police or individuals of discharge, release, or escape of person who is deemed dangerous to public as affected by "discretionary act or duty" exception to Federal Tort Claims Act. 171 A.L.R. Fed. 655.

Claims arising from conduct of governmental employer in administering or failing to administer medical care as within discretionary function exception of Federal Tort Claims Act (28 U.S.C.S. § 2680(a)). 172 A.L.R. Fed. 407.

Liability of United States, under Federal Tort Claims Act (28 U.S.C.S. § 1346, 2680), for damages caused by ingestion or administration of government-approved drugs, vaccines, and medications. 173 A.L.R. Fed. 431.

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U.S.C.S. § 3680(c), concerning claims arising in respect of assessment or collection of any tax or customs duty, or detention of goods or merchandise by any officer of customs or excise or any other law-enforcement officer. 173 A.L.R. Fed. 465.

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§ 11-46-11. Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind.

(1) After all procedures within a governmental entity have been exhausted, any person having a claim under this chapter shall proceed as he might in any action at law or in equity, except that at least ninety (90) days

before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.

(2)(a) Service of notice of claim shall be made as follows:

(i) For local governments:

1. If the governmental entity is a county, then upon the chancery clerk of the county sued;

2. If the governmental entity is a municipality, then upon the city clerk.

(ii) If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), or is a political subdivision other than a county or municipality, service of notice of claim shall be had only upon that entity's or political subdivision's chief executive officer. The chief executive officer of a governmental entity participating in a plan administered by the board pursuant to Section 11-46-7(3) shall notify the board of any claims filed within five (5) days after receipt thereof.

(b) Every notice of claim shall:

(i) Be in writing;

(ii) Be delivered in person or by registered or certified United States mail; and

(iii) Contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought, and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

(3)(a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

(b) No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit; failure to file within the time allowed is an absolute bar to any further proceedings under this chapter.

(c) All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.

(d)(i) To determine the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim is effective upon delivery by the methods statutorily designated in this chapter.

(ii) The limitations period provided in this section controls and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other

characterization the claimant may use to describe it, or the provisions of any other statute of limitations that would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

HISTORY: Laws, 1984, ch. 495, § 7; reenacted without change, Laws, 1985, ch. 474, § 6; Laws, 1987, ch. 483, § 6; Laws, 1988, ch. 479, § 3; Laws, 1993, ch. 476, § 5; Laws, 1999, ch. 469, § 1; Laws, 2000, ch. 315, § 1; Laws, 2002, ch. 380, § 1; Laws, 2012, ch. 513, § 1, eff from and after July 1, 2012.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in the fifth sentence of (3), as amended by Laws, 1999, ch. 469, § 1. The words “denial of notice of claim” were changed to “notice of denial of claim.” The Joint Committee ratified the correction at its April 28, 1999 meeting.

Editor’s Notes — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

JUDICIAL DECISIONS

ANALYSIS

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1. In general.

Emergency Medical Treatment and Ac-

tive Labor Act (EMTALA), 42 U.S.C.S. § 1395dd, incorporates and does not preempt Miss. Code Ann. § 11-46-11(1), the State-law requirement at issue here, that defendant municipalities be given pre-suit notice of tort claims pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. Plaintiff’s claims against the hospital under the EMTALA were therefore dismissed for failure to comply with the MTCA’s strictly-construed pre-suit notice requirement. *Glaskox v. George Cnty. Hosp.*, — F. Supp. 3d —, 2016 U.S. Dist. LEXIS 100223 (S.D. Miss. Aug. 1, 2016).

Court upheld a ruling against a medical center in a medical malpractice action under the Mississippi Tort Claims Act because substantial evidence supported the judgment; although the expert testimony was conflicting, there was ample evidence for a finding that the patient had

pneumonia while she was in the hospital and that the hospital staff failed to diagnose her. *Univ. of Miss. Med. Ctr. v. Johnson*, 977 So. 2d 1145, 2007 Miss. App. LEXIS 345 (Miss. Ct. App. 2007).

Allowing a plaintiff to file suit before 90 days have passed since noticing the claim is tantamount to reading out the notice provisions of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, and gross disregard for the notice provisions is not considered substantial compliance. *Wright v. Quesnel*, 876 So. 2d 362, 2004 Miss. LEXIS 801 (Miss. 2004).

The statute applied to a case where the event giving rise to the action occurred on June 1, 1994, clearly after the Act went into effect. *Henderson v. Un-Named Emergency Room*, 758 So. 2d 422, 2000 Miss. LEXIS 79 (Miss. 2000), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

A notice of claim delivered to the administrator of a subsidiary hospital may be held to constitute valid notice upon the subsidiary's parent hospital chain; however, the record in the present case was too sparse to make a final determination in such regard and, therefore, the trial court's ruling dismissing the case would be reversed and the matter would be remanded for additional findings. *Humphrey v. Ocean Springs Hosp.*, 749 So. 2d 1044, 1999 Miss. LEXIS 360 (Miss. 1999).

The effective date of this section was April 1, 1993. *Pickens v. Donaldson*, 748 So. 2d 684, 1999 Miss. LEXIS 292 (Miss. 1999).

A school district was not entitled to dismissal on the basis of noncompliance with the statute where there was evidence that there were some negotiations between the school district's insurance carrier and the plaintiff and that there was a letter sent from the insurance carrier to the plaintiff, confirming a previous conversation between the plaintiff and the carrier, initiated by the carrier, which indicated evidence that the carrier was notified of the claim by someone from the school district. *Smith County Sch. Dist. v. McNeil*, 743 So. 2d 376, 1999 Miss. LEXIS 267 (Miss. 1999), overruled in part, *Stuart*

v. Univ. of Miss. Med. Ctr., 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Plaintiff's claim was barred by the applicable one-year statute of limitation where the complaint was filed nearly two years and five months after the accident at issue. *State v. Dampeer*, 744 So. 2d 754, 1999 Miss. LEXIS 218 (Miss. 1999).

In order to carry out the legislative purpose of providing relief to injured citizens, the court held that substantial compliance with the notice provisions of this section is sufficient. *Reaves by & Through Rouse v. Randall*, 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

This section does not require notice be filed with a governmental entity's insurance company. *Brewer v. Burdette*, 1999 Miss. LEXIS 150 (Miss. Apr. 15, 1999), op. withdrawn, sub. op., 768 So. 2d 920, 2000 Miss. LEXIS 223 (Miss. 2000).

A substantial compliance standard applies with respect to the notice of claim requirements of this section. *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Police officer's action in turning onto road despite fact that view of oncoming traffic was blocked by row of hedges, while negligent, did not turn collision with motorist into crime of assault, so as to relieve motorist of having to comply with notice requirements in Tort Claims Act in subsequent personal injury claim against city and officer. *City of Jackson v. Lumpkin*, 697 So. 2d 1179, 1997 Miss. LEXIS 306 (Miss. 1997), overruled, *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Uninsured motorist carrier's third party subrogation claim against city accrued, and one-year statute of limitations began to run, on date of accident. *Coleman v. American Mfrs. Mut. Ins. Co.*, 930 F. Supp. 255, 1996 U.S. Dist. LEXIS 8961 (N.D. Miss. 1996).

In a personal injury action against a city and city officials, the 6-year statute of limitations set forth in § 15-1-49, rather than the 2-year statute of limitations set forth in § 11-46-11(3) of the Tort Claims Act, applied since the Tort Claims Act had not yet taken effect. *Starnes v. Vardaman*, 580 So. 2d 733, 1991 Miss. LEXIS 312 (Miss. 1991).

2. Constitutionality.

Supreme Court of Mississippi holds that the March 2002 amendment to Miss. Code Ann. § 11-46-11(4) is unconstitutional to the extent that it makes the savings clause applicable to all claims since April 1, 1993. However, the savings clause as first enacted in April of 2000 is valid and enforceable, and those claims in existence on May 15, 2000, are subject to the savings clause. *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337, 2004 Miss. LEXIS 778 (Miss. 2004).

The one-year statute of limitations in the Mississippi Tort Claims Act is rationally related to a proper legislative purpose, i.e., protecting the state's interest in conserving government funds and protecting the public health and welfare at the earliest possible moment, and, therefore, is constitutional. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 1999 Miss. LEXIS 31 (Miss. 1999), overruled, *Caves v. Yarbrough*, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007).

The notice provision of this section does not violate the equal protection clause of the federal constitution, notwithstanding that it requires a person to give 90 days notice to the head of a governmental entity before suing that entity, whereas this type of notice is not required when suing an individual. *Vortice v. Fordice*, 711 So. 2d 894, 1998 Miss. LEXIS 248 (Miss. 1998).

3. Legislative intent.

Court erred in dismissing a student's personal injury lawsuit against a university and two of its police officers on the ground that the action was barred by the statute of limitations; applying Miss. Code Ann. § 11-46-11 as written, the student timely filed lawsuit. It was the intention of the Legislature to toll the statutory

period, meaning to suspend temporarily, and to grant claimants 90 days in addition to the one year in which to file their lawsuits. *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004).

The legislature intended for the statute to take effect from and after April 1, 1993, its date of passage. *Chamberlin v. City of Hernando*, 716 So. 2d 596, 1998 Miss. LEXIS 295 (Miss. 1998).

4. Applicability.

Circuit court properly denied the Mississippi State Port Authority's motion to dismiss based on a contractor's failure to comply with the Mississippi Tort Claims Act (MTCA) prior to filing a wrongful termination claim because the MTCA was not implicated; a contract existed between the parties, and the contractor brought an action for breach of that specific contract and had not alleged any breach of some duty independent of the contract. *Miss. State Port Auth. at Gulfport v. S. Indus. Contrs. LLC*, 271 So. 3d 742, 2018 Miss. App. LEXIS 653 (Miss. Ct. App. 2018).

Contractor's claim against a county engineer in his individual capacity for acts outside the scope of his employment were not subject to the presuit notice requirements of the Tort Claims Act because the claim was for tortious interference with a contract, which required proof of malice as an essential element. *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

Whiting v. University of Southern Mississippi, 62 So. 3d 907 (Miss. 2011), did not overrule *Zumwalt v. Jones County Board of Supervisors*, 19 So. 3d 672 (Miss. 2009), or *McGehee v. DePoyster*, 708 So. 2d 77 (Miss. 1998); however, due to the conflicting decisions that have arisen in district courts and the court of appeals, the supreme court overrules *Whiting* to the extent it held a claim for tortious interference with a contract is subject to presuit notice requirements of the Tort Claims Act. *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

In a case in which property owners alleged that a county supervisor, a contractor, and a subcontractor engaged in a

scheme to profit from a debris-removal contract between a county and the contractor by not paying the property owners for providing a dumpsite, the property owners were not required to give the county supervisor notice of their claims because the property owners alleged that the county supervisor's conduct amounted to fraud and malice and such conduct was outside the scope of the county supervisor's employment. *Bradley v. Kelley Bros. Contrs., Inc.*, 117 So. 3d 331, 2013 Miss. App. LEXIS 340 (Miss. Ct. App. 2013).

Judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' supersedeas bonds prevented the creditors from recovering from the bonds was governed by the Mississippi Tort Claims Act; therefore, the Act's one-year statute of limitations, not the general three-year limitations period, applied. *Newton County v. State ex rel. Dukes*, 133 So. 3d 819, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 8 (Miss. 2014), aff'd in part and rev'd in part, 133 So. 3d 805, 2014 Miss. LEXIS 143 (Miss. 2014).

Trial court, on remand, had to determine whether at the time of the alleged negligent conduct, the doctor was an employee of a state entity covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1; if so, the trial court had to further determine whether the statute of limitations had run as to the doctor as prescribed by Miss. Code Ann. § 11-46-11. *McClain v. Clark*, 992 So. 2d 636, 2008 Miss. LEXIS 515 (Miss. 2008).

Suit against the state transportation commission, alleging a taking without just compensation in violation of Miss. Const. Art. 3, § 17, need not have been brought under the Mississippi Tort Claims Act, and thus was not time-barred under Miss. Code Ann. § 11-46-11(3), because the constitutional provision was self-executing. *McLemore v. Miss. Transp. Comm'n*, 992 So. 2d 1107, 2008 Miss. LEXIS 305 (Miss. 2008).

Tax sale purchasers' entire suit against the chancery clerk for failing to reimburse them for the 1994 taxes they paid when the prior owner redeemed the property for 1993 unpaid taxes was not governed by Miss. Code Ann. § 11-46-11 because the

purchasers had raised claims in law for damages and in equity for recovery of land, which were not tort claims. *Alexander v. Taylor*, 928 So. 2d 992, 2006 Miss. App. LEXIS 357 (Miss. Ct. App. 2006).

Decedent's estate's negligence action against the circuit court clerks for failing to enroll a foreign judgment was barred by the one-year statute of limitations in the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-11, because the complaint alleged that the court clerks were negligent in performing their official duties and the addition of the sureties as parties did not change the action into a contract action. Also, the action accrued when the estate learned that judgment had not been enrolled and not when the judgment debtor later filed bankruptcy, and the bankruptcy court held that the judgment was unenforceable in Mississippi. *Estate of Spiegel v. Western Sur. Co.*, 908 So. 2d 859, 2005 Miss. App. LEXIS 525 (Miss. Ct. App. 2005).

Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., applied to the university professor's attempt to recover tort damages; the alleged wrongful conduct by the university and individuals was the tortious failure to give her a new contract, and since the professor's claim of tortious interference was a tort claim and not a contract claim, she could only pursue that claim against the State using the Tort Claims Act. *Black v. Ansah*, 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 822 (Miss. 2004).

Former university professor's tortious interference with contract claim against the university that formerly employed her and its officials was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann. § 11-46-11(3) as it was not timely filed. *Black v. Ansah*, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), op. withdrawn, sub. op., 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

Statute did not apply to medical malpractice action because the tortious act occurred three years before the statute came into effect, thus the general medical malpractice statute, Miss. Code Ann. § 15-1-36 applied and allowed a patient two years to file suit. *Bailey v. Al-Mefty*, 807 So. 2d 1203, 2001 Miss. LEXIS 229 (Miss. 2001).

When the simple requirements of the act have been substantially complied with, jurisdiction will attach for the purposes of the act. *Reaves by & Through Rouse v. Randall*, 729 So. 2d 1237, 1998 Miss. LEXIS 624 (Miss. 1998), modified, 1998 Miss. LEXIS 643 (Miss. Dec. 31, 1998), op. withdrawn, sub. op., 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999).

5. Relation to other laws.

Emergency Medical Treatment and Active Labor Act (EMTALA), 42 USCS § 1395dd, incorporates and does not preempt Miss. Code Ann. § 11-46-11(1), the State-law requirement at issue here, that defendant municipalities be given pre-suit notice of tort claims pursuant to the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq. Plaintiff's claims against the hospital under the EMTALA were therefore dismissed for failure to comply with the MTCA's strictly-construed pre-suit notice requirement. *Glaskox v. George Cnty. Hosp.*, — F. Supp. 3d —, 2016 U.S. Dist. LEXIS 100223 (S.D. Miss. Aug. 1, 2016).

6. "Chief executive officer."

Trial court erred in dismissing a son's wrongful death action against a state hospital because its director was the hospital's CEO under the Mississippi Tort Claims Act (MTCA), and the son provided pre-suit notice to the proper party; the definition of "State" in the MTCA included hospitals, and the Department of Mental Health was not a substitute for the CEO of the hospital, which was the "state entity." *Ivy v. E. Miss. State Hosp.*, 191 So. 3d 120, 2016 Miss. LEXIS 188 (Miss. 2016).

Department of Human Services was a state "department," as such, proper service would be had on the chief executive officer of DHS; nothing in the record showed there was even an attempt by the

father to serve DHS's chief executive officer, or anyone at DHS. *Little v. Miss. Dep't of Human Servs.*, 835 So. 2d 9, 2002 Miss. LEXIS 333 (Miss. 2002), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142, 2003 U.S. LEXIS 6253 (U.S. 2003), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

The term "chief executive officer" may be read to include any of the following: president of the board, chairman of the board, any board member, or such other person employed in an executive capacity by a board or commission who can be reasonably expected to notify the governmental entity of its potential liability. *Reaves by & Through Rouse v. Randall*, 729 So. 2d 1237, 1998 Miss. LEXIS 624 (Miss. 1998), modified, 1998 Miss. LEXIS 643 (Miss. Dec. 31, 1998), op. withdrawn, sub. op., 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999).

7. Form of notice.

Although the complainant challenged the trial court's finding that the complainant's handwritten notice of claim was insufficient to satisfy the statutory pre-suit notice requirement, the appellate court was unable to consider the complainant's argument because the complainant failed to see that the record included a copy of the notice for the appellate court to review. Accordingly, the circuit court's ruling that the complainant failed to substantially comply with the pre-suit notice requirement was considered correct. *O'Hara v. City of Hattiesburg*, 222 So. 3d 314, 2017 Miss. App. LEXIS 165 (Miss. Ct. App. 2017).

Grant of summary judgment in favor of the employee's employer was proper where the employee failed to substantially comply with the notice provisions of the Mississippi Tort Claim Act's, Miss. Code Ann. § 11-46-1 et seq., Miss. Code Ann. § 11-46-11. *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 2004 Miss. LEXIS 492 (Miss. 2004).

Negligence complaint against a sheriff's deputy was properly dismissed in a case where no notice of action was given to the deputy until a full two years after the alleged negligent conduct occurred. Con-

rod v. Holder, 825 So. 2d 16, 2002 Miss. LEXIS 249 (Miss. 2002).

A failure to comply with the requirement that a notice of claim be mailed by registered or certified mail will not serve as a basis to dismiss an action; in cases in which notice is sent by first class mail, a governmental entity must demonstrate actual prejudice resulting from the failure to comply with the registered or certified mail requirement in order to be entitled to a dismissal on this basis. *Thornburg v. Magnolia Reg'l Health Ctr.*, 741 So. 2d 220, 1999 Miss. LEXIS 181 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

The statutory language implies that the required notice should be a single document which must in fact be sent by the claimant. *Soileau v. Mississippi Coast Coliseum Comm'n*, 730 So. 2d 101, 1998 Miss. App. LEXIS 1028 (Miss. Ct. App. 1998).

8. Written notice.

Dismissal of a contractor's claim against a county engineer for tortious interference with a road construction contract was appropriate because the claim implicated the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., and there was a lack of pre-suit notice. *Springer v. Ausbern Constr. Co.*, 231 So. 3d 1065, 2016 Miss. App. LEXIS 499 (Miss. Ct. App. 2016), *aff'd*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

Regardless of whether the individual complied with the notice requirement under Miss. Code Ann. § 11-46-11, the conversion claim failed because the individual had not shown any ownership interest in anything she claims was wrongfully converted. *Zumwalt v. Jones County Bd. of Supervisors*, 19 So. 3d 672, 2009 Miss. LEXIS 421 (Miss. 2009).

In a case in which a professor asserted a claim for intentional infliction of emotional distress against a state university, the university was entitled to summary judgment on that claim since the professor had not complied with the notice requirement in the Mississippi Tort Claims Act. *Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 2009 U.S. Dist. LEXIS 35271 (S.D. Miss. 2009).

In an employment discrimination case in which a former teacher had not complied with the notice requirement in Miss. Code Ann. § 11-46-11, pursuant to the Mississippi Supreme Court, the failure to provide the 90 days' notice was grounds for summary judgment. *Burnworth v. Vicksburg Warren Sch. Dist.*, 2008 U.S. Dist. LEXIS 57434 (S.D. Miss. July 24, 2008).

Building owner's claims against a city for money had and received and unjust enrichment constituted implied-in-law contract causes of action and were covered by the Mississippi Tort Claims Act; the owner's failure to submit a notice of claim prior to commencing the suit meant its claims were barred under Miss. Code Ann. § 11-46-11(1). *1704 21st Ave., Ltd v. City of Gulfport*, 988 So. 2d 412, 2008 Miss. App. LEXIS 457 (Miss. Ct. App. 2008).

Finding against the employee in his action after he was terminated was proper because although he filed his suit against the sheriff's department and the sheriff within the statutorily prescribed period in Miss. Code Ann. § 11-46-11(3), he still failed to comply with the Mississippi Tort Claims Act since he filed his complaint 37 days before he filed his notice of claim with the sheriff's department. *Clanton v. DeSoto County Sheriff's Dep't*, 963 So. 2d 560, 2007 Miss. App. LEXIS 30 (Miss. Ct. App. 2007).

Although Miss. Code Ann. § 11-46-11 requires a plaintiff to file a notice of claim as a condition precedent to seeking damages from a municipal entity, it does not require the entity to respond to the notice of claim in order to preserve the defense of immunity. *Mitchell v. City of Jackson*, 481 F. Supp. 2d 586, 2006 U.S. Dist. LEXIS 95887 (S.D. Miss. 2006), *aff'd*, 223 Fed. Appx. 411, 2007 U.S. App. LEXIS 6889 (5th Cir. Miss. 2007).

There is no provision in the statute for actual or constructive notice, and a requirement of written notice is expressly stated. *Holmes v. Defer*, 722 So. 2d 624, 1998 Miss. LEXIS 530 (Miss. 1998), overruled, *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999). But see *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss.*

Med. Ctr., 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

9. Sufficiency of notice.

Accident victim's pre-suit notice of claim to the Mississippi Department of Transportation was not sufficient because, although the notice disclosed that on or about a date one year earlier the victim wrecked a motorcycle on a particular highway, that the victim suffered personal injuries and property damages, and that the victim was seeking damages in excess of a certain amount, the notice provided no information to satisfy the extent of the injury and as to the victim's residence at the time of the injury and at the time of the claim. *Lane v. Miss. DOT*, 220 So. 3d 254, 2017 Miss. App. LEXIS 290 (Miss. Ct. App. 2017).

Circuit court erred in granting a city's motion to dismiss a driver's personal injury action because a letter sent to the mayor by the driver's attorney provided information about each of the statutorily required categories, including, *inter alia*, the notice was in writing, delivered via certified mail, contained a short and plain statement of the facts upon which his claim was based, the time and place that his injury occurred, the name of the person known to be involved, the amount of damages the driver sought to recover. *Marbly v. Manuel*, 210 So. 3d 1033, 2015 Miss. App. LEXIS 411 (Miss. Ct. App. 2015).

Where a teacher was terminated for accessing confidential student information, the teacher's malicious interference with employment claim survived because, regarding presuit notice under the Mississippi Torts Claims Act, the superintendent did not address the *Zumwalt* decision in rebuttal or attempt to distinguish it, and the determination of whether the superintendent acted in bad faith and "without right or justifiable cause" presented a fact issue. *Dearman v. Stone County Sch. Dist.*, — F. Supp. 3d —, 2014 U.S. Dist. LEXIS 37489 (S.D. Miss. Mar. 21, 2014).

Notice-of-claim letter a daughter gave a state-sponsored hospital complied fully with the requirements of Miss. Code Ann. § 11-46-11(2) because the written notice-of-claim letter sent contained a statement

of the facts upon which the claim was based, including the circumstances that brought about a father's injuries and the time, place, and extent of those injuries, including the father's alleged wrongful death; the notice also included the names of all persons known to be involved, it specified the amount of money damages the daughter sought, and the letter gave the residence address of one of the persons making the claim and the person who sent the notice. *Saul ex rel. All Wrongful Death Heirs of Cook v. South Central Reg'l Med. Ctr., Inc.*, 25 So. 3d 1037, 2010 Miss. LEXIS 13 (Miss. 2010).

In a case in which a circuit court dismissed a mother's medical negligence claim against a hospital because she had not complied with the 90-day notice requirement Miss. Code Ann. § 11-46-11(1) and the mother raised constitutional challenges to the Mississippi Tort Claims Act for the first time on appeal, it was clear that she resorted to those novel claims on appeal because there was no error on the part of the circuit court. While the mother gave the hospital notice, she filed suit after only 85 days, and the 90-day requirement in § 11-46-11(1) was a mandatory rule which the courts strictly enforce. *Jones v. Laurel Family Clinic, P.A.*, 37 So. 3d 665, 2010 Miss. App. LEXIS 14 (Miss. Ct. App. 2010).

Order granting summary judgment in favor of a city with regard to a property owner's action under the Mississippi Tort Claims Act was affirmed because the owner failed to meet the notice requirements of Miss. Code Ann. § 11-46-11(2). The notice only contained the circumstances which brought about the owner's injury and the time and place of the injury, and failed to provide the extent of injury suffered, the names of all the persons known to be involved, the money damages sought, or the owner's residential address either at the time of the injury or at the time of the filing of the notice. *Webster v. City of D'Iberville City Council*, 6 So. 3d 448, 2009 Miss. App. LEXIS 185 (Miss. Ct. App. 2009).

Representative's first notice letter regarding a wrongful death claim complied with the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-

46-23; the notice was not statutorily insufficient simply because it did not specifically mention all of the claims ultimately raised in the complaint. The timing of the representative's second letter was irrelevant. *Briere v. S. Cent. Reg'l Med. Ctr.*, 3 So. 3d 126, 2009 Miss. LEXIS 89 (Miss. 2009).

Driver and passenger could not maintain their action against a county and a county employee because they failed to abide by the notice requirements of Miss. Code Ann. § 11-46-11(2); their letters to the county's insurance adjuster contained only scant information and did not provide information in each of the seven categories required in § 11-46-11(2). *Parker v. Harrison County Bd. of Supervisors*, 987 So. 2d 435, 2008 Miss. LEXIS 360 (Miss. 2008).

With regard to the ripeness of a Takings Clause claim, adequate state procedures include both administrative and state court remedies, and Mississippi has provided an adequate procedure for compensation in the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11; however, merely sending a notice of claim letter is not sufficient for a plaintiff to avail himself of the adequate state judicial procedure provided in the Act. The entity receiving the letter is under no obligation to respond and may choose to remain silent, and once the plaintiff files a notice of claim and the defendant has been given an opportunity to respond, the plaintiff may then sue under the Act. *Waltman v. Payne*, 535 F.3d 342, 2008 U.S. App. LEXIS 14757 (5th Cir. Miss. 2008).

Licensee's U.S. Const. Amend. V takings claim that a sheriff, thinking they were marijuana plants, destroyed kenaf plants that were growing on the land upon which the licensee held a hunting license was unripe because the licensee had not sought compensation under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11, by filing state court suit; the licensee's sending of a letter seeking compensation under § 11-46-11 was insufficient to exhaust the adequate remedies provided by Mississippi, and instead, the licensee should have filed a state court suit after receiving no response to his letter. *Waltman v. Payne*, 535 F.3d 342,

2008 U.S. App. LEXIS 14757 (5th Cir. Miss. 2008).

In a patient's medical malpractice suit against a hospital and a limited liability company, diversity jurisdiction existed because the hospital was improperly joined since the patient provided deficient notice under the Mississippi Tort Claims Act because the notice contained no information regarding the amount of damages sought or the patient's residence at the time of injury or filing. *Harden v. Field Mem. Cmty. Hosp.*, 516 F. Supp. 2d 600, 2007 U.S. Dist. LEXIS 28436 (S.D. Miss. 2007), *aff'd*, 265 Fed. Appx. 405, 2008 U.S. App. LEXIS 3524 (5th Cir. Miss. 2008).

In an employment dispute with the university, its former president, and its former vice-president of academic affairs, the former professor's state-law tort claims were barred for lack of jurisdiction under the Mississippi Tort Claims Act because the professor's grievance and letter of representation did not substantially comply with the notice requirements of Miss. Code Ann. § 11-46-11(2) since: (1) the grievance letter to the board of trustees did not inform the university or the board of trustees of the professor's intent to file a claim in court; (2) the notice of claim was not filed after administrative remedies had been exhausted; (3) the notice of his claim was not served on the president of the university as required; (4) neither the letter nor the grievance stated an amount of damages sought or the extent of the alleged injury; and (5) the letter was not served upon the former president of the university. *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158, 2007 Miss. App. LEXIS 492 (Miss. Ct. App. 2007), *cert. denied*, 977 So. 2d 1144, 2008 Miss. LEXIS 150 (Miss. 2008).

Trial court erred in finding that the patient substantially complied with the notice provisions of Miss. Code Ann. § 11-46-11(2); due to the lack of any written notice, the patient failed to comply with the mandatory requirements of § 11-46-11(2) as none of the seven required categories of information were provided. *South Cent. Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252, 2006 Miss. LEXIS 289 (Miss. 2006).

Injured person's letter of notice was not sent to the county, but rather to an attor-

ney. In addition, the letter: (1) was not sent by registered mail or certified mail, nor was it delivered in person; (2) did not contain a short and plain statement of the facts with regard to circumstance of injury; (3) did not give the extent of injuries; (4) did not give the name of all persons involved; (5) did not list the damages sought; and (6) did not give the residence of the claimant. Because there was a bare attempt at “minimal compliance,” and certainly not “substantial compliance,” summary judgment for the county was proper. *Fairley v. George County*, 871 So. 2d 713, 2004 Miss. LEXIS 415 (Miss. 2004).

Telephone calls to several supervisors and a letter directed to a county employee regarding a fall down a staircase in a courthouse was sufficient to comply with the notice requirements of Miss. Code Ann. § 11-46-11(2). *Williams v. Clay County*, 861 So. 2d 953, 2003 Miss. LEXIS 659 (Miss. 2003), overruled, *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004).

There was substantial compliance with the notice requirements where the city received a notice of claim letter and suffered no actual prejudice as a result of plaintiffs failure to include her own address, because plaintiff was represented by an attorney at the time and his address was included. *Powell v. City of Pascagoula*, 752 So. 2d 999, 1999 Miss. LEXIS 385 (Miss. 1999), overruled in part, *Tallahatchie Gen. Hosp. v. Howe*, 49 So. 3d 86, 2010 Miss. LEXIS 645 (Miss. 2010).

The notice substantially complied with the requirements of the notice provisions of this section where it provided sufficient details regarding the incident at issue and was served on the city clerk and the city attorney. *City of Pascagoula v. Tomlinson*, 741 So. 2d 224, 1999 Miss. LEXIS 180 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

The plaintiff's notice of claim substantially complied with the statutory requirements where (1) the notice letter, sent to the defendant's Manager for Public Housing listed the persons involved in the accident, when the accident occurred, and the circumstances which brought about the injury, (2) the plaintiff's attorney con-

tacted the defendant's offices to inquire as to who was the chief executive officer, (3) the plaintiff's attorney explained that the claim originated from the public housing division of the defendant, and (4) the Manager of Public Housing was employed by the defendant in an executive capacity and through the letter he received, the defendant's board of commissioners was put on notice of the claim. *Tennessee Valley Regional Hous. Auth. v. Bailey*, 740 So. 2d 869, 1999 Miss. LEXIS 169 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

The plaintiff's actions of communicating with the defendant board of supervisors equated to substantial compliance with the notice requirements of this section where (1) there was prolonged, continuous, and extensive communications between the parties, (2) as a result of these discussions, information regarding the plaintiff's claim was directed to and/or received by numerous people associated with the county, and (3) all of the parties involved in the settlement discussions were directly associated with the county and/or the board of supervisors. *Ferrer v. Jackson County Bd. of Supervisors*, 741 So. 2d 216, 1999 Miss. LEXIS 166 (Miss. 1999).

The plaintiff substantially complied with the notice provisions of this section where her notice letter, sent to the superintendent of the defendant school district, listed the persons involved in the accident, when the accident occurred, where the accident occurred, and what vehicles were involved. *Reaves by & Through Rouse v. Randall*, 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Notice of claim to the chairman of the Mississippi Gaming Commission is sufficient to satisfy the pre-suit notice of claim requirements under the substantial compliance doctrine of the Mississippi Tort Claims Act. *Alexander v. Mississippi Gaming Comm'n*, 735 So. 2d 360, 1999 Miss. LEXIS 136 (Miss. 1999).

The plaintiff substantially complied with the requirements for a notice of claim

where she provided the defendant town with all of the required information except a liquidated amount of damages, although she stated the extent of her injuries in adequate detail; she was given the form by a city employee and assisted in completing the form; and once her damages were ascertainable, the insurance adjuster was made aware of same and actively pursued settlement with the plaintiff and her attorney. *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

The plaintiff substantially complied with the notice provisions of the act where her notice letter, sent to the school superintendent, listed the persons involved in the accident at issue, when the accident occurred, where the accident occurred, and what vehicles were involved; the superintendent was employed in an executive capacity by the school board and through this letter the board was put on notice of the claim. *Reaves by & Through Rouse v. Randall*, 729 So. 2d 1237, 1998 Miss. LEXIS 624 (Miss. 1998), modified, 1998 Miss. LEXIS 643 (Miss. Dec. 31, 1998), op. withdrawn, sub. op., 1999 Miss. LEXIS 151 (Miss. Mar. 26, 1999).

An initial incident report, coupled with correspondence between the plaintiff's attorney, the defendant coliseum's attorney, and the coliseum's insurance adjuster did not constitute compliance with the notice provisions of the statute. *Soileau v. Mississippi Coast Coliseum Comm'n*, 730 So. 2d 101, 1998 Miss. App. LEXIS 1028 (Miss. Ct. App. 1998).

The plaintiff failed to comply with the notice requirements of the statute where he maintained communication only with the insurance carrier of the defendant political subdivision and did not file a notice of claim with the superintendent of the school district as required under the strict compliance standard of the statute. *Watts by & Through Watts v. Lafayette County Sch. Dist.*, 737 So. 2d 1019, 1998 Miss. App. LEXIS 1075 (Miss. Ct. App. 1998).

10. Time to file action.

Trial court erred in concluding that the pre-suit notice filed by a student's parents

triggered the statute of limitations because the parents never filed a complaint on the student's behalf. *Doe v. Holmes Cty. Sch. Dist.*, 246 So. 3d 920, 2018 Miss. App. LEXIS 225 (Miss. Ct. App. 2018).

Because a student was incapacitated during the time she filed a claim against a school district she should have been allowed to substitute her mother; the student's parents did not file suit on her behalf, and thus, the mother could be substituted as an interested party and file a complaint on the student's behalf until she was twenty-one, or the student could individually file after turning twenty-one within the one-year statute of limitation prescribed under the Mississippi Tort Claims Act. *Doe v. Holmes Cty. Sch. Dist.*, 246 So. 3d 920, 2018 Miss. App. LEXIS 225 (Miss. Ct. App. 2018).

Estate's claims for loss of society and companionship were not untimely pursuant to the one-year statute of limitations. While the claims the decedent could have brought had she not died were rendered untimely by application of the one-year statute of limitations, the estate's claims for loss of society and companionship did not accrue until her death. *Fedrick v. Quorum Health Res., Inc.*, 45 So. 3d 667, 2009 Miss. App. LEXIS 926 (Miss. Ct. App. 2009).

Miss. Code Ann. § 11-46-11(3) was clear that the patient should have filed her claim against the doctor for medical malpractice within one year of the alleged conduct; the patient did not exercise due diligence to discover the doctor's employment status, and there was no evidence that the doctor, hospital, or clinics concealed the doctor's status. *Stark v. Greenwood Leflore Hosp.*, 39 So. 3d 901, 2009 Miss. App. LEXIS 347 (Miss. Ct. App. 2009), cert. dismissed, 24 So. 3d 1038, 2010 Miss. LEXIS 22 (Miss. 2010).

Plaintiff may file a complaint without waiting the full 90 days under Miss. Code Ann. § 11-46-11(1) if the plaintiff receives a denial of notice of claim pursuant to § 11-46-11(3). *Lee v. Mem'l Hosp.*, 999 So. 2d 1263, 2008 Miss. LEXIS 599 (Miss. 2008).

Where summary judgment was granted in favor of a medical center based upon a wrongful death beneficiary's filing of his

complaint only 41 days after he served the medical center with his notice of claim, the reviewing court rejected the argument that dismissal with prejudice was improper absent egregious circumstances warranting such a harsh sanction. While such a rule applied to the dismissal of medical malpractice actions for failure to comply with the 60-day notice provision of Miss. Code Ann. § 15-1-36(15), this case was governed by the Mississippi Tort Claims Act (MTCA), and the court was bound to adhere to the supreme court's precedent interpreting it. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 652, 2008 Miss. App. LEXIS 774 (Miss. Ct. App. 2008), rev'd, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Estate's doctor's affidavit did not allege any negligent conduct by the nursing home or its manager within one year of the notice of the estate's wrongful death claim; there was no genuine issue of material fact regarding whether the doctor raised a timely allegation of negligence. *Estate of Fedrick v. Quorum Health Res., Inc.*, 2008 Miss. App. LEXIS 672 (Miss. Ct. App. Nov. 4, 2008), rev'd, 45 So. 3d 641, 2010 Miss. LEXIS 363 (Miss. 2010).

Mississippi Supreme Court's 2006 decision requiring strict compliance with the Mississippi Tort Claims Act's 90-day notice requirement had to be applied retroactively to a case pending at the time of the 2006 decision because the supreme court did not specifically state that its 2006 holding applied prospectively only. *Stuart v. Univ. of Miss. Med. Ctr.*, 2008 Miss. App. LEXIS 379 (Miss. Ct. App. June 24, 2008).

Patient's medical malpractice case against a regional medical center was properly dismissed where the patient failed to strictly comply with the notice provisions of Miss. Code Ann. § 11-46-11(1). The patient filed his notice of claim with the center and then filed suit less than a week later, although the patient should have waited 90 days before filing suit. *Brown v. Southwest Miss. Reg'l Med. Ctr.*, 989 So. 2d 933, 2008 Miss. App. LEXIS 71 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 434 (Miss. 2008).

Patient's medical malpractice suit against a medical center was properly

dismissed with prejudice because the patient failed to timely file suit within the one-year statute of limitations. *Johnson v. Rao*, 952 So. 2d 151, 2007 Miss. LEXIS 178 (Miss. 2007).

Patient's medical malpractice and wrongful death action against the Mississippi Department of Health (MDH) was time-barred under Miss. Code Ann. § 11-46-11(3) because the alleged improper prenatal care occurred no later than August 6, 1999, the last date the patient was treated at the clinic, the statute of limitations expired no later than August 6, 2000, and MDH did not receive notice of claim until October 24, 2000. *Pounds v. Miss. Dep't of Health*, 946 So. 2d 413, 2006 Miss. App. LEXIS 476 (Miss. Ct. App. 2006).

Record was clear that the patient's complaint against the hospital was filed fifty-five days after the accident occurred, and the hospital was served four days later; therefore, even though no written notice was contained in the record, the patient clearly did not wait the statutory ninety days under Miss. Code Ann. § 11-46-11(1) before commencing the action against the hospital. *South Cent. Reg'l Med. Ctr. v. Guffy*, 930 So. 2d 1252, 2006 Miss. LEXIS 289 (Miss. 2006).

Pursuant to Miss. Code Ann. § 11-46-11(3), a resident's negligence complaint against the county was timely; he filed his complaint on January 16, 2002, and assuming that he gave notice on August 7, 2000, the statute of limitations was tolled for 120 days or until December 5, 2000; after the tolling period ended, the one-year statute commenced running, and the deadline for filing was March 5, 2002. *Farmer v. Bolivar County*, 910 So. 2d 671, 2005 Miss. App. LEXIS 168 (Miss. Ct. App. 2005).

Dismissal of the individual's action against the city, fire department, fire department employee, and municipal services company after she was injured when the employee backed a fire truck into the individual's car was appropriate pursuant to Miss. Code Ann. § 11-46-11 since her complaint was filed beyond the one-year statute of limitations and she did not establish that the company's conduct was fraudulent, or that the company pre-

vented her from filing her complaint on time. *Patrick v. Shields*, 912 So. 2d 1114, 2005 Miss. App. LEXIS 749 (Miss. Ct. App. 2005).

County board of supervisors and engineers were not entitled to dismissal of landowners' claims for damages allegedly sustained as a result of the board's and engineers' negligence in designing, approving, and constructing a subdivision that flooded, on the ground that the claims were barred by the one-year statute of limitations in Miss. Code Ann. § 11-46-11(3), because the statute of limitations began to run when the subdivision flooded or the landowners discovered that the flooding resulted from the design of the subdivision and the landowners' notices of claim, which tolled the statute of limitations, was filed within a year of both. *Scheinblum v. Lauderdale County Bd. of Supervisors*, 350 F. Supp. 2d 743, 2004 U.S. Dist. LEXIS 26321 (S.D. Miss. 2004).

Trial court properly granted summary judgment in favor of county hospital where an individual did not file suit against the hospital until more than two years after tripping on its sidewalk; the hospital's contract with a private management company to run the hospital did not exempt it from the Mississippi Tort Claims Act. *Allstadt v. Baptist Mem. Hosp.*, 2004 Miss. App. LEXIS 847 (Miss. Ct. App. Aug. 24, 2004), op. withdrawn, sub. op., 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Trial court properly granted summary judgment for defendants in a medical malpractice case where, since the hospital was protected by the Mississippi Tort Claims Act (MTCA), the husband had to meet the requirements of Miss. Code Ann. § 11-46-11; he did not substantially comply with the MTCA requirements; plaintiff filed his complaint after the one-year statute of limitations had expired. *Davis v. Hoss*, 869 So. 2d 397, 2004 Miss. LEXIS 319 (Miss. 2004).

District court did not err in dismissing a claim filed against a county under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, because the claim was filed after the one-year statute of limitations had expired; an injured party did not receive extra time to file the

claim under Miss. Code Ann. § 11-46-11(3) after the time period had run because both tolling periods had run prior to the expiration of the one-year period. *Williams v. Clay County*, 861 So. 2d 953, 2003 Miss. LEXIS 659 (Miss. 2003), overruled, *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004).

Professor did not timely file her claim under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. where the professor knew of her claim when or soon after she received the May 1999 notice that her contract would not be renewed; at no time in the proceedings did the professor allege that she had failed to realize the connection she presently claimed between her whistleblowing and the refusal to renew her contract. *Black v. Ansah*, 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 822 (Miss. 2004).

Victim's one-year window under Miss. Code Ann. § 11-46-11(3) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., to file a notice of claim against the State for damages related to the victim's rape by a parolee did not begin to run until the day the victim was raped, and the victim's notice of claim and complaint were timely filed, although the court ultimately found the State immune from liability under Miss. Code Ann. § 11-46-9(1). *Connell v. State*, 841 So. 2d 1127, 2003 Miss. LEXIS 147 (Miss. 2003), op. withdrawn, 2003 Miss. LEXIS 625 (Miss. Nov. 6, 2003), sub. op., 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

Although the tort claims act allowed 90 days after the running of the one-year statute of limitations for filing of a claim, a widow's claim against the county for the death of her husband was time barred because she filed it 94 days after the statute had run. *Marshall v. Warren County Bd. of Supervisors*, 831 So. 2d 1211, 2002 Miss. App. LEXIS 703 (Miss. Ct. App. 2002).

Discovery rule applied to the Mississippi Tort Claim Act's statute of limitations; the circuit court erred in holding that the parents' claim against the hospital was untimely filed because it calculated the time in which to file the com-

plaint by using the old 95-day period for filing a notice of claim instead of the amendment's 120-day period. *Moore v. Mem'l Hosp.*, 825 So. 2d 658, 2002 Miss. LEXIS 279 (Miss. 2002).

Trial court did not err in granting summary judgment to a hospital that was a governmental entity under Miss. Code Ann. § 11-46-11(1), where the parents on behalf of their minor child failed to file their suit for negligent care and treatment against the hospital within the one-year limitation period under the Mississippi Tort Claims Act at Miss. Code Ann. § 11-46-11(3). *Moore v. Mem'l Hosp.*, 2002 Miss. LEXIS 134 (Miss. Apr. 11, 2002).

Amendment to statute was retroactive as claims pending at the time of the statute's amendment and not barred by its previous limitation gave them the benefit of the longer limitations period. *Hollingsworth v. City of Laurel*, 808 So. 2d 950, 2002 Miss. LEXIS 62 (Miss. 2002).

Mother's suit against the chancery court clerk for failure to timely disburse funds from another suit was properly dismissed where the complaint was barred by the one-year statute of limitations of Miss. Code Ann. § 11-46-11(3) on tort claims brought against public officials. The claim accrued when the court clerk received the funds in late 1997, to reimburse the mother for medical bills she paid arising out of her daughter's automobile accident, but the mother's suit was not filed until December 6, 1999. *Young v. Benson*, 828 So. 2d 821, 2002 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 829 So. 2d 1245, 2002 Miss. App. LEXIS 606 (Miss. Ct. App. 2002).

The trial court erred when it dismissed a personal injury action against a city on the ground that the plaintiff did not wait 90 days after filing his notice of claim to commence the action; the appropriate remedy would have been for the court to issue an order staying the lawsuit until such time as the city had been given the benefit of the waiting period. *Jackson v. City of Wiggins*, 760 So. 2d 694, 2000 Miss. LEXIS 63 (Miss. 2000), overruled in part, *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

A notice of claim that included a settlement offer that would expire in 20 days did not violate the 90 day waiting period for filing an action. *Thornburg v. Magnolia Reg'l Health Ctr.*, 741 So. 2d 220, 1999 Miss. LEXIS 181 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Although a party must wait 90 days from the providing of notice to file a lawsuit, the dismissal of a lawsuit based on a failure to comply with the waiting period is a disproportionate remedy; instead, a governmental entity should request that the trial court issue an order staying the lawsuit until such time as the entity has been given the benefit of the applicable waiting period, and the governmental entity should be permitted to recover any expenses, including court costs and attorney's fees, which it incurs in obtaining a stay of the proceedings. *City of Pascagoula v. Tomlinson*, 741 So. 2d 224, 1999 Miss. LEXIS 180 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

11. Discovery rule.

It was error to grant a hospital and subsidiary summary judgment on the ground that a widow had not filed suit within the one-year statute of limitations because a genuine issue of material fact existed on whether the statute of limitations was tolled since she produced evidence of reasonable diligence under the discovery rule; the widow made numerous inquiries regarding the final death certificate, and there was a two-year gap between the death and the issuance of the final death certificate. *Lyas v. Forrest Gen. Hosp.*, 177 So. 3d 412, 2015 Miss. LEXIS 541 (Miss. 2015).

Judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' supersedeas bonds prevented the creditors from recovering from the bonds was timely under the Mississippi Tort Claims Act's one-year statute of limitations, because it was filed within a year after judgment was rendered on the bonds. *Newton County v. State ex rel. Dukes*, 133 So. 3d 819, 2013 Miss. App.

LEXIS 332 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 8 (Miss. 2014), *aff'd* in part and *rev'd* in part, 133 So. 3d 805, 2014 Miss. LEXIS 143 (Miss. 2014).

Circuit court erred in granting a hospital's motion to dismiss a daughter's wrongful-death action on the ground that the one-year statute of limitations, Miss. Code Ann. § 11-46-11(3) barred her claims because the wrongful-death claims were timely brought, and the discovery rule applied to her survival-type claims; however, it could not be determined whether the daughter's survival-type claims were timely brought because the record did not indicate whether, before the father died, he "discovered" the act or omission by the hospital that allegedly caused his injuries, and whether he did or not, and whether the daughter's survival-type claims were timely brought, had to be decided by the fact-finder. *Saul ex rel. All Wrongful Death Heirs of Cook v. South Central Reg'l Med. Ctr., Inc.*, 25 So. 3d 1037, 2010 Miss. LEXIS 13 (Miss. 2010).

Order granting a medical center's motion for summary judgment in a patient's medical malpractice action on the ground that the patient filed her complaint outside the limitations period set forth in the Mississippi Tort Claims Act's (MTCA), Miss. Code Ann. § 11-46-11, was reversed, and the case was remanded for a determination of when the patient, by exercise of reasonable diligence, did or should have known of her alleged injury and the acts or omissions because in its order granting the motion for summary judgment, the trial court specifically relied upon a supreme court decision and correctly determined that it applied retroactively to the patient's claim; however, since a second supreme court decision revived the discovery rule and mandated that the MTCA's one-year statute of limitations began to run when the patient knew, or by exercise of reasonable diligence should know, of both the damage or injury, the operative question was whether statutory notice was provided within a year next following the earliest date the patient, by exercise of reasonable diligence, should have known of the injury and the acts or omission that caused them. *Weary v. Blake*, 17 So. 3d

635, 2009 Miss. App. LEXIS 600 (Miss. Ct. App. 2009).

Trial court erred in ruling that a widow's claims for wrongful death/medical malpractice were barred based on the statute of limitations because a widow could not have known both the damage or injury and the act or omission until at least the date the decedent vomited blood and died later that day. *Naomi Ruth McDonald v. Mem'l Hosp.*, 8 So. 3d 175, 2009 Miss. LEXIS 187 (Miss. 2009).

By reenacting Miss. Code Ann. § 11-46-11(3) without addressing or countermanding the Mississippi Supreme Court's decision in *Barnes*, the Legislature acquiesced and tacitly approved and incorporated into the statute a discovery rule as announced in *Barnes*. Pursuant to the doctrine of *stare decisis*, the discovery rule was recognized as to § 11-46-11(3). *Caves v. Yarbrough*, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Summary judgment was improperly granted to several health care providers in a medical negligence case because the limitations period in Miss. Code Ann. § 11-46-11 did not bar the claim; a discovery rule was recognized for claims filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23. *Caves v. Yarbrough*, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

One-year statute of limitations under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 through 11-46-23, begins to run when a claimant knows, or by exercise of reasonable diligence should know, of both the damage or injury, and the act or omission which proximately caused it. The finder of fact must decide when those requirements are satisfied. *Caves v. Yarbrough*, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

By reenacting Miss. Code Ann. § 11-46-11(3) without addressing or countermanding the Mississippi Supreme Court's decision in *Barnes v. Singing River Hosp.*, 733 So. 2d 199 (Miss. 1999), the Mississippi Legislature has acquiesced and tacitly approved and incorporated into § 11-46-11(3) a discovery rule as announced in *Barnes*. Pursuant to the doctrine of *stare decisis*, the Mississippi Supreme Court shall continue to recognize a discovery

rule with respect to § 11-46-11(3). *Caves v. Yarbrough*, 991 So. 2d 142, 2008 Miss. LEXIS 617 (Miss. 2008).

Supreme Court of Kansas overrules *Barnes v. Singing River Hosp.*, 733 So. 2d 199, 205 (Miss. 1999), and its progeny, insofar as they judicially amended the statutes of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 et seq., by supplying a discovery rule tolling the MTCA's one-year statute of repose. *Caves v. Yarbrough*, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007), op. withdrawn, sub. op., 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007).

Husband's medical malpractice and wrongful death claim against the hospital was not barred under Miss. Code Ann. § 11-46-11(3) where there was sufficient evidence to show that the husband was reasonably diligent in investigating the cause of his wife's death; there were numerous requests made for medical records and the husband submitted a notice of claim and filed suit shortly after the expert witness determined that the records indicated wrongful conduct; the husband could not have known of the alleged wrongdoing until he had access to the necessary medical records. *Forrest County General Hosp. v. Kelley*, 914 So. 2d 242, 2005 Miss. App. LEXIS 440 (Miss. Ct. App. 2005).

When the patient discovered that the patient's child had died in the womb, the patient should have known that there was some causal connection between the death and the doctor's treatment. Moreover, even if the patient did not recognize the causal connection at the time of death, there was absolutely no indication that the patient made any attempts to determine the cause of the patient's child's death until after one year had elapsed; thus, there was no issue of fact with respect to whether the discovery rule tolled the statute of limitations, and accordingly, the state hospital and its doctor were entitled to summary judgment. *Wright v. Quesnel*, 876 So. 2d 362, 2004 Miss. LEXIS 801 (Miss. 2004).

Denial of the general hospital's and physicians' motion to transfer venue in a medical malpractice action was improper where the general hospital was entitled to

venue in the county in which the principal offices were located; further, the decedent's heirs were not reasonably diligent in investigating the cause of her injuries, the discovery rule did not apply in the case, and the claims against the medical center and treating physicians were, therefore, time-barred, Miss. Code Ann. § 11-46-11 (Rev. 2002). *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Libel claims against a county filed more than one year after the last publication of allegedly defamatory statements by a coroner about the cause of death of a convalescent center patient were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) as time-barred because the discovery rule did not apply to libel actions under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(3). *River Oaks Convalescent Ctr., Inc. v. Coahoma County*, 280 F. Supp. 2d 565, 2003 U.S. Dist. LEXIS 23855 (N.D. Miss. 2003).

Trial court erred in dismissing the money damages portion of the landowner's complaint against the county as time barred; the second flood on the landowner's property occurred just six months before the third flood and his learning of bridge alterations by the county, due to which his property was damaged; within six months after the third flood, the landowner learned of the alleged cause, and six months was a reasonable period in which to discover the alleged cause of the harm. *Punzo v. Jackson County*, 861 So. 2d 340, 2003 Miss. LEXIS 750 (Miss. 2003).

Action for wrongful death should not be given the benefit of the discovery rule; thus, a decedent's heirs' medical malpractice action against a hospital and three physicians was time-barred because it was brought over two years after the decedent's death, which was beyond the one-year statute of limitations of the Mississippi Tort Claims Act. *Wayne Gen. Hosp. v. Hayes*, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003).

Although the discovery rule applied to claims filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, involving latent injuries, it did not operate to toll the statute of limita-

tions because an injured party was aware of an injury after a fall down a staircase, despite the fact that the full extent of the injuries was not apparent. *Williams v. Clay County*, 861 So. 2d 953, 2003 Miss. LEXIS 659 (Miss. 2003), overruled, *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004).

The discovery rule does not apply to toll the accrual of a libel claim and to prevent the running of the one year statute of limitations under the statute. *Ellisville State Sch. v. Merrill*, 732 So. 2d 198, 1999 Miss. LEXIS 70 (Miss. 1999).

The discovery rule did not apply to an action for burns sustained by a quadriplegic when hot packs were placed on the backs of his legs during physical therapy treatments, notwithstanding his contention that he was unaware of the cause of action until he received correspondence from a physician stating the cause of the injuries; the plaintiff knew of his injuries at the time they occurred, since his burns were treated that day and for months afterwards, and he threatened legal action the next day. *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204, 1999 Miss. LEXIS 57 (Miss. 1999).

The discovery rule applies to Tort Claims Act actions involving latent injuries. *Robinson v. Singing River Hosp. Sys.*, 732 So. 2d 204, 1999 Miss. LEXIS 57 (Miss. 1999).

Despite the absence of specific discovery language in this section, the discovery rule applies to subsection (3) of this section in actions involving latent injuries. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 1999 Miss. LEXIS 31 (Miss. 1999), overruled, *Caves v. Yarbrough*, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007).

The discovery rule did not apply to an action in which the plaintiff alleged that the volunteer director/emergency medical technician for a city ambulance service negligently contributed to the death of her husband since the death of her husband was not a latent injury. *Chamberlin v. City of Hernando*, 716 So. 2d 596, 1998 Miss. LEXIS 295 (Miss. 1998).

12. Estoppel to assert statute of limitations.

Statute of limitations barred homeowners' complaint against a city because the

doctrine of equitable estoppel did not apply; the listing of the wrong person as the residence's licensed contractor were the result of a mistaken belief, and there was no proof that the city or its permit manager knew or had reason to know that its actions or inactions would result in the homeowners' claims or suits being barred by a statute of limitations. *City of Tupelo v. McMillin*, 192 So. 3d 948, 2016 Miss. LEXIS 152 (Miss. 2016).

County was not estopped from asserting the statute of limitations defense in a case involving a claim filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, because the statements of a county employee regarding the payment of medical bills were not fraudulent since an injured party failed to submit any valid medical claims; therefore, a trial court did not err in dismissing the case for failing to state a cause of action. *Williams v. Clay County*, 861 So. 2d 953, 2003 Miss. LEXIS 659 (Miss. 2003), overruled, *Page v. Univ. of S. Miss.*, 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004).

The defendant was not estopped from asserting the statute of limitations since, although settlement negotiations were ongoing between the parties, there was never any representation by the defendant that the statute of limitations was tolled, and the plaintiff did not allege that the defendant led him to believe that he need not comply with the statute. *Mississippi Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662, 1999 Miss. LEXIS 194 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

The defendant town and its insurer were estopped from asserting that the plaintiff failed to strictly comply with the notice of claim requirements where (1) the notice of claim form did not provide a blank for liquidated damages other than for an estimate for property damage; (2) the completed form disclosed the date and time of the accident, the nature/cause of the accident, persons/witnesses involved, and the exact location of the accident; (3) the insurer was given a medical release to obtain the plaintiff's medical records and did obtain those records in a timely fashion; (4) the plaintiff and her attorney

cooperated fully with the city and its insurer throughout the investigation and settlement discussions; (5) the plaintiff and her attorney were contacted directly by the insurer and dealt almost exclusively with the insurer; and (6) the town and its insurer only asserted the plaintiff's failure to strictly comply after settlement negotiations broke down approximately one year and 90 days after the fall and after the plaintiff filed suit and discovery was completed. *Carr v. Town of Shubuta*, 733 So. 2d 261, 1999 Miss. LEXIS 72 (Miss. 1999), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

13. Tolling of limitation period.

Circuit court erred in dismissing a visitor's personal injury action against a university, its athletic department, and the Mississippi Institutes of Higher Learning (jointly, the university) because, while the visitor's notice of claim letters failed to comply with the Mississippi Tort Claims Act—failing to provide the university with the amount of damages sought, the visitor's residential address at the time of injury, and the visitor's residential address at the time the letter was mailed to the university—the court erred in dismissing the claim with prejudice inasmuch as the complaint was properly filed within one year of the incident, thereby tolling the statute of limitations. *Keever v. Miss. Insts. of Higher Learning*, — So. 3d —, 2019 Miss. App. LEXIS 184 (Miss. Ct. App. Apr. 30, 2019).

Because a state university's head football coach, who had a viable claim against the university for breach of the implied covenant of good faith and fair dealing, did not satisfy the pre-suit notice requirement of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., the coach's claim had to be dismissed without prejudice. The coach could refile the claim as the statute of limitations was tolled by the initial filing until the complaint was dismissed for lack of proper pre-suit notice. *Jones v. Miss. Insts. of Higher Learning*, 264 So. 3d 9, 2018 Miss. App. LEXIS 378 (Miss. Ct. App. 2018).

Tolling provision of the Mississippi Tort Claims Act (MTCA) statute of limitations

does not toll the separate statute of limitations applicable to non-MTCA defamation claims. Therefore, a notice of claim did not toll a statute of limitations for a defamation claim against an alderman because the statute of limitations for a non MTCA case applied. *Williams v. City of Belzoni*, 229 So. 3d 171, 2017 Miss. App. LEXIS 126 (Miss. Ct. App. 2017).

Where a court declined to exercise supplemental jurisdiction over the Mississippi Tort Claims Act (MTCA) claims of an arrestee and her children after their federal 42 U.S.C.S. § 1983 claims were dismissed with prejudice, those MTCA claims were dismissed without prejudice to refile in state court, and the limitations period in Miss. Code Ann. § 11-46-11 was deemed tolled during the pendency of the case in federal court. *Smith v. City of Nettleton*, 2008 U.S. Dist. LEXIS 101175 (N.D. Miss. Dec. 15, 2008).

Where plaintiff, the deceased patient's daughter, brought a medical malpractice suit against the University of Mississippi Medical Center, the statute of limitations for the wrongful-death claim began to run on December 19, 2004 when the patient died; since plaintiff's notice of claim letter was received on November 28, 2005, it was timely given within the one-year of the date of death as required by Miss. Code Ann. § 11-46-11(3). The statute of limitations was tolled for ninety-five days from the date of the notice, and plaintiff timely brought suit on February 21, 2006. *Univ. of Miss. Med. Ctr. v. McGee*, 999 So. 2d 837, 2008 Miss. LEXIS 597 (Miss. 2008).

Supreme Court of Mississippi held that the March 2002 amendment to Miss. Code Ann. § 11-46-11(4) was unconstitutional to the extent that it made the savings clause for minors' claims under the Miss. Tort Claims Act applicable to all claims since April 1, 1993, as doing so could revive claims that previously been barred by the statute of limitations. *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337, 2004 Miss. LEXIS 778 (Miss. 2004).

Pursuant to Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, and Miss. Code Ann. § 15-1-1, Miss. Code Ann. § 15-1-69 did not apply

to the MTCA, and it is worth noting that non-tort claims act cases are not controlling as to the applicability of § 15-1-69, and because the MTCA has a one-year statute of limitation that is significantly shorter than the catchall three-year statute of limitation, the one-year statute of limitation found in Miss. Code Ann. § 11-46-11 is controlling; thus, the court rejected the parents' claim that Miss. Code Ann. § 15-1-69 applied to the MTCA to toll the statute of limitations under Miss. Code Ann. § 11-46-11. *Stockstill v. State*, 854 So. 2d 1017, 2003 Miss. LEXIS 449 (Miss. 2003).

Injured party's suit against a school district was timely filed; the injured party gave notice of her claim to the district within the one-year statutory time period, and she filed her suit within the subsequent 90-day period available for filing suit. *Roberts v. New Albany Separate Sch. Dist.*, 813 So. 2d 729, 2002 Miss. LEXIS 131 (Miss. 2002).

Statutory amendments were prospective only and not retroactive; where plaintiff filed a suit under the amended statute, the claim could not be applied retroactively and the pre-amendment statute dictated the outcome of the case. *Roberts v. New Albany Separate Sch. Dist.*, 2001 Miss. LEXIS 230 (Miss. Sept. 13, 2001), op. withdrawn, sub. op., 813 So. 2d 729, 2002 Miss. LEXIS 131 (Miss. 2002).

The one (1) year statute of limitations of the Mississippi Tort Claims Act set forth in this section is not tolled by the minors' savings clause in § 15-1-59. *Hays v. Lafayette County Sch. Dist.*, 759 So. 2d 1144, 1999 Miss. LEXIS 376 (Miss. 1999).

The minor savings clause in § 15-1-59 only applies to periods of limitation within that chapter and not to the Mississippi Tort Claims Act, and plaintiff failed to file her claim under the MTCA within the prescribed limitations period. *Hays v. Lafayette County Sch. Dist.*, 759 So. 2d 1144, 1999 Miss. LEXIS 376 (Miss. 1999).

The Mississippi Tort Claims Act's one year statute of limitations expressed in this section is not tolled by the "minor savings clause" of § 15-1-59 until the minor achieves majority. *Marcum v. Hancock County Sch. Dist.*, 741 So. 2d 234, 1999 Miss. LEXIS 189 (Miss. 1999).

The statute of limitations was not tolled by fraud with regard to a medical malpractice claim where (1) the first request for the plaintiff's medical records was made on November 13, 1995, (2) when he did not receive the record by January 29, 1996, plaintiff's attorney contacted the hospital and was informed of the fee for copying the file, and (3) after plaintiff's attorney paid the copying fee, the medical records were delivered sometime in mid-February of 1996. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 1999 Miss. LEXIS 31 (Miss. 1999), overruled, *Caves v. Yarbrough*, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007).

14. Minor savings clause.

Trial court erred in granting a school district's motion to dismiss a student's action under the Mississippi Tort Claims Act because the claim was tolled under the minors savings clause until she reached the age of majority or an interested party actually filed a complaint on her behalf; the minors savings clause was the controlling provision in the student's claim because the purpose of the statute was to protect the legal rights of those unable to assert their own rights due to disability. *Doe v. Holmes Cty. Sch. Dist.*, 246 So. 3d 920, 2018 Miss. App. LEXIS 225 (Miss. Ct. App. 2018).

Mere filing and reception of a notice of claim do not trigger the running of a statute of limitations when the statute of limitations is tolled by the minors savings clause. *Doe v. Holmes Cty. Sch. Dist.*, 246 So. 3d 920, 2018 Miss. App. LEXIS 225 (Miss. Ct. App. 2018).

Minor savings clause added to the Mississippi Tort Claims Act in 2000 did not apply retroactively to a medical negligence claim that accrued in 1997. *Blailock v. Hubbs*, 919 So. 2d 126, 2005 Miss. LEXIS 360 (Miss. 2005).

15. Intervention.

In an action arising out of an automobile accident in which five persons and five others were injured, it was error for the court to permit the representatives of two of the deceased persons to intervene in an action filed against the defendant city where the motion for intervention was not

filed until after the expiration of the notice of claim and statute of limitations provisions of this section. *City of Tupelo v. Martin*, 747 So. 2d 822, 1999 Miss. LEXIS 278 (Miss. 1999).

16. Illustrative cases.

Because a state university's head football coach, who had a viable claim against the university for breach of the implied covenant of good faith and fair dealing, did not satisfy the pre-suit notice requirement of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., the coach's claim had to be dismissed without prejudice. The coach could refile the claim, to be tried by the judge without a jury, as the statute of limitations was tolled by the initial filing until the complaint was dismissed for lack of proper pre-suit notice. *Jones v. Miss. Insts. of Higher Learning*, 264 So. 3d 9, 2018 Miss. App. LEXIS 378 (Miss. Ct. App. 2018).

Despite the different notice requirements in Miss. Code Ann. § 15-1-36 and the Mississippi Tort Claims Act, a daughter did not have to file different wrongful death lawsuits at different times because she could have waited until the earliest she could have filed all her claims and still comply with the statute's pre-suit notice requirement and the two-year statute of limitations; the daughter's notice served to toll the statute of limitations, and she had an additional ninety days to file suit. *Estate of Davis v. Blaylock*, 212 So. 3d 755, 2017 Miss. LEXIS 2 (Miss. 2017).

Sweet-potato buyer could not maintain his claims against a various state officials for, inter alia, malicious prosecution, false arrest and imprisonment, abuse of process, and intentional infliction of emotional distress because the officials were entitled to sovereign immunity as to the buyer's federal civil rights claims since states were not "persons" subject to liability and since some alleged personal involvement in the complaint or a causal connection between their conduct and the violation was required, and the buyer's state-law claims failed to comply with the 90-day pre-suit notice requirement and the one-year statute of limitations in the Mississippi Tort Claims Act. *Gatheright v. Barbour*, — F. Supp. 3d —, 2017 U.S. Dist.

LEXIS 3143 (N.D. Miss. Jan. 9, 2017), superseded, — F. Supp. 3d —, 2017 U.S. Dist. LEXIS 17366 (N.D. Miss. Feb. 6, 2017).

University medical center did not waive its right to claim its affirmative statute-of-limitations defense because it provided a reasonable justification for why it did not move the trial court for summary judgment until months after the complaint was filed as it lacked exact knowledge of when plaintiff discovered the claim necessary to present its statute-of-limitations defense; it pleaded the defense and timely pursued discovery of the information needed to successfully bring the defense to the court's attention; and, once it gained the necessary information via plaintiff's deposition, it promptly filed a motion for summary judgment on the basis of its defense and pursued the court's adjudication of its defense. *Univ. of Miss. Med. Ctr. v. Hampton*, 227 So. 3d 1138, 2016 Miss. App. LEXIS 652 (Miss. Ct. App. 2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 413 (Miss. 2017).

In a wrongful death action, plaintiff's complaint was filed outside of the limitations period because the discovery date of her cause of action was November 12, 2010; the university medical center received notice of plaintiff's claim on November 7, 2011; the 95-day tolling period ended on February 10, 2012; the medical center denied plaintiff's claim on February 28, 2012, but the remaining five days in the original one-year statute were calculated from February 10, 2012, the date on which the tolling period expired; and the five days remaining in the original limitations period combined with the final 90 days expired on May 15, 2012; thus, plaintiff's complaint filed on May 29, 2012, was filed 14 days outside of the limitations period. *Univ. of Miss. Med. Ctr. v. Hampton*, 227 So. 3d 1138, 2016 Miss. App. LEXIS 652 (Miss. Ct. App. 2016), cert. dismissed, — So. 3d —, 2017 Miss. LEXIS 413 (Miss. 2017).

Trial court properly dismissed the injured plaintiffs' negligence action against a city and a visitors bureau because the plaintiffs failed to present a question of material fact regarding the city's liability and failed to give the bureau proper notice

of the claim under the Mississippi Tort Claims Act where, while the bureau's budget had to be approved by the city, it was a political subdivision that was separate entity from the city, funded by a tax, the proceeds of which were deposited into a separate account dedicated solely to the bureau's activities, and the legislature vested the bureau with a variety of powers to carry out duties for the city; primarily promoting tourism for the benefit of the city and its citizens. *Barnes v. City of Canton*, 207 So. 3d 1272, 2016 Miss. App. LEXIS 268 (Miss. Ct. App. 2016).

When a developer sued a city, the city's public utilities commission, and a utilities department (department) for damage to the developer's property in installing utility lines, it was error to grant summary judgment dismissing the developer's claims under the Mississippi Tort Claims Act on the basis of the statute of limitations because the developer's claims arguably did not accrue until the department refused to repair the damage, rather than when the developer became aware of the damage. *Kelley v. Corinth PUC*, 200 So. 3d 1107, 2016 Miss. App. LEXIS 36 (Miss. Ct. App.), cert. denied, — So. 3d —, 2016 Miss. LEXIS 393 (Miss. 2016), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 394 (Miss. 2016), cert. denied, 203 So. 3d 599, 2016 Miss. LEXIS 403 (Miss. 2016).

Ambulance service was entitled to Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., protections because the ambulance service was an instrumentality of governmental entities. Therefore, the ambulance service was entitled to summary judgment in a wrongful death suit because the complainant did not file her complaint within the one-year statute of limitations. *Woodall v. AAA Ambulance Serv.*, 161 So. 3d 1071, 2015 Miss. LEXIS 188 (Miss. 2015).

Trial court did not abuse its discretion by determining that no good cause was shown by a property owner in failing to timely serve process on a county under Miss. R. Civ. P. 4, because the owner made no attempt to obtain an extension of time to serve process on the county. *Sturdivant v. Moore Bayou Water Ass'n*, 130 So. 3d 1152, 2013 Miss. App. LEXIS 493 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 81 (Miss. 2014).

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Thus, the other driver was not entitled to an extension of time to effect service, the statute of limitations had expired under Miss. Code Ann. § 11-46-11(3), and the complaint was subject to dismissal with prejudice. *Copiah County Sch. Dist. v. Buckner*, 61 So. 3d 162, 2011 Miss. LEXIS 258 (Miss. 2011).

Personal-injury action did not need to be remanded for a determination of the mother's competency under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., because the son did not request a determination of unsoundness of mind from the trial court and issues not raised in the trial court were barred from consideration at the appellate level. Further, because the son brought the action on behalf of his mother and she was not the plaintiff in the case, her competence to assert her rights in the lawsuit was not at issue, Miss. Code Ann. § 11-46-11(4). *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941, 2011 Miss. LEXIS 281 (Miss. 2011).

Driver and center did not waive their defenses under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Although there was an approximately 11-month delay in the case, during the delay no party took any action to advance the litigation and during the delay, the center and driver pursued their affirmative defenses by informing the mother's son of their intent to seek a hearing on the motion to dismiss, Miss. Code Ann. § 11-46-11(3). *Kimball Glassco Residential Ctr. v. Shanks*, 64 So. 3d 941, 2011 Miss. LEXIS 281 (Miss. 2011).

Grant of summary judgment in favor of the university, Board, and others was proper because the professor failed to wait for a final decision by the Board regarding approval of her application for tenure prior to filing suit; her claims based on tortious conduct, tortious breach of contract, and breach of an implied contrac-

tual term or warranty were foreclosed by her failure to adhere to the requirement of the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., that all administrative remedies be exhausted prior to filing suit. *Whiting v. Univ. of S. Miss.*, 62 So. 3d 907, 2011 Miss. LEXIS 170 (Miss. 2011), overruled in part, *Springer v. Ausbern Constr. Co.*, 231 So. 3d 980, 2017 Miss. LEXIS 418 (Miss. 2017).

In a medical malpractice action, summary judgment was properly granted in favor of defendant doctor because he was employed by an entity covered by the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23 (2002), and was thus afforded the MTCA's protection and because plaintiff patient failed to provide a timely notice of the claim under the MTCA. Because MTCA's one-year statute of limitations had expired, the patient was barred from asserting a claim for the wrongful death of her 10-month-old son. *Gorton v. Rance*, 52 So. 3d 351, 2011 Miss. LEXIS 62 (Miss. 2011).

Trial court erred by denying the community hospital's motion for summary judgment because: (1) the community hospital was a political subdivision of the State under Miss. Code Ann. § 11-46-1(i), and therefore the son was subject to the notice requirements and statutes of limitations of Miss. Code Ann. § 11-46-11(1); (2) under § 11-46-11(1), proper service of notice to the hospital would be on the CEO of the hospital, and not the county; (3) the trial court erred by concluding that substantial compliance with § 11-46-11(1) in regard to whom the notice was sent was erroneous; and (4) because the son never filed the statutorily required notice with the hospital's CEO, the hospital's sovereign immunity from suit was intact. *Tallahatchie Gen. Hosp. v. Howe*, 49 So. 3d 86, 2010 Miss. LEXIS 645 (Miss. 2010).

Jackson v. Lumpkin, 697 So. 2d 1179, 1181 (Miss. 1997) and *Carr v. Town of Shubuta*, 733 So. 2d 261, 265 (Miss. 1999) and their progeny are overruled to the extent that these cases characterize the notice requirements set out in the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-11 (Rev. 2002), as jurisdictional requirements because the notice requirements in the MTCA are substan-

tive requirements, which are no more or less important than a statute of limitations; the notice requirements in the MTCA are not jurisdictional, but they are nonjurisdictional and, therefore, waivable. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Medical center's motion for summary judgment should have been denied in a beneficiary's wrongful-death action because the medical center waived its objection to the beneficiary's noncompliance with the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(1), when it participated in the lawsuit and failed to raise the beneficiary's noncompliance with the ninety-day-notice requirement until two-and-a-half years after the suit was filed; at no point throughout the trial and appellate processes did the medical center provide an explanation for why it waited two-and-a-half years from the filing of the complaint to actually pursue a defense that was available to it from the moment the beneficiary filed the complaint, and waiting for that length of time and doing nothing to prevent the case from proceeding was unreasonable and inexcusable. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Where a wrongful death beneficiary served a notice of claim upon a medical center and filed a wrongful death claim 41 days later, the medical center was entitled to summary judgment because the complaint was filed in violation of the 90-day notice requirement of Miss. Code Ann. § 11-46-11(1), which courts were bound to strictly enforce. *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 652, 2008 Miss. App. LEXIS 774 (Miss. Ct. App. 2008), rev'd, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Where the deceased patient's daughter brought a medical malpractice suit against the University of Mississippi Medical Center after it was discovered that a sponge was left in the patient's body during a surgery performed on September 1, 2004, plaintiff sent a notice-of-claim letter to the medical center on November 21, 2005 and filed a medical negligence suit on February 21, 2006. The Supreme

Court of Mississippi held that plaintiff's survival claim based on the negligent act of leaving the sponge in the patient accrued more than one year prior to providing notice; thus, that claim was barred by the statute of limitations. *Univ. of Miss. Med. Ctr. v. McGee*, 999 So. 2d 837, 2008 Miss. LEXIS 597 (Miss. 2008).

In a medical malpractice case, a hospital patient substantially complied with Miss. Code Ann. § 11-46-11(2)'s requirement that she list all persons known to be involved by stating multiple hospital employees caused her injuries. If the identity of these persons was not known, the patient, who was unconscious a majority of her time at the hospital, was not required to provide their names. *Lee v. Mem'l Hosp.*, 999 So. 2d 1263, 2008 Miss. LEXIS 599 (Miss. 2008).

Ninety-day notice requirement of Miss. Code Ann. § 11-46-11 was to be strictly enforced by the courts; where plaintiffs in an automobile negligence action against a governmental agency and its employee failed to strictly comply with the 90-day pre-suit notice requirement of Miss. Code Ann. § 11-46-11(1) and filed their complaint only seven days after sending their notice letter, the circuit court never obtained jurisdiction over their complaint and therefore erred in denying the government agency's motion to dismiss. *Bunton v. King*, 995 So. 2d 694, 2008 Miss. LEXIS 447 (Miss. 2008), overruled in part, *Stuart v. Univ. of Miss. Med. Ctr.*, 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Where a doctor working in partnership with a community hospital was sued for medical malpractice, he did nothing to assert immunity under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., for five years until he moved for summary judgment; because he delayed and actively participated in discovery, he waived MTCA immunity. To be in compliance with the MTCA, plaintiff would have had to sue the partnership, joining the doctor under Miss. Code Ann. § 11-46-7(2) in his representative capacity only, and would have been required to provide ninety-day notice pursuant to Miss. Code Ann. § 11-46-11(1). *Estate of Grimes v. Warrington*, 982 So. 2d 365, 2008 Miss. LEXIS 101 (Miss. 2008).

Wife's medical malpractice action against a hospital and a physician for her husband's death was untimely under Miss. Code Ann. § 11-46-11(3), and therefore the trial court properly granted the hospital and physician summary judgment, where her husband died on April 17, 2000, and her notice of claim was not provided to the hospital until February 13, 2002, and was never provided to the physician. *Caves v. Yarbrough*, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007), op. withdrawn, sub. op., 2007 Miss. LEXIS 710 (Miss. Dec. 6, 2007).

Where plaintiff fireman filed claims against defendants, a city, its mayor, and an alderman for wrongful demotion, because the fireman failed to provide the pre litigation notice as required by Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act, a wrongful demotion tort claim was barred. *Montgomery v. Mississippi*, 498 F. Supp. 2d 892, 2007 U.S. Dist. LEXIS 49604 (S.D. Miss. 2007).

Appellate court reversed the denial of a university medical center's motion for summary judgment because plaintiff failed to comply with the ninety-day notice requirement under Miss. Code Ann. § 11-46-11(1). Judgment was entered for the medical center. *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss.), cert. denied, 549 U.S. 995, 127 S. Ct. 549, 166 L. Ed. 2d 369, 2006 U.S. LEXIS 8061 (U.S. 2006).

Summary judgment in favor of the driver was affirmed because there was no issue of material fact that the driver, by running a stop sign, was not acting outside the course and scope of her employment with the governmental entity, and it was undisputed that the claimants did not comply with the one year statute of limitations that accompanied actions under the Mississippi Tort Claims Act. *Jackson v. Hodge*, 911 So. 2d 625, 2005 Miss. App. LEXIS 647 (Miss. Ct. App. 2005).

Government hospital was properly dismissed from a medical negligence suit; the parents of a child with cerebral palsy did not sue the hospital within the one-year limitation set forth in the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11(3). The discovery rule did not apply, because the child's injuries were apparent

at birth. *Blailock v. Hubbs*, 919 So. 2d 126, 2005 Miss. LEXIS 360 (Miss. 2005).

Even if the language in the contract had been convincing enough to create a private entity and the county hospital had been deemed private, the injured person's claim remained one of premises liability. The agreement did not alter the fact that the county remained the owner of the physical property that comprised the hospital, and that includes the sidewalk outside the hospital where the injured person tripped and fell; thus, the trial court did not err in granting summary judgment in favor of the county hospital due to the injured person's claim being filed outside the one-year statute of limitations under Miss. Code Ann. Section 11-46-11(3). *Allstadt v. Baptist Mem'l Hosp.*, 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Trial court erred in denying the medical center's summary judgment claim. The statute of limitations barred the minor's claim in 1996 and Miss. Code Ann. 11-46-11(4) unconstitutional to the extent that it revived claims that had previously been barred by the statute of limitations. *Univ. of Miss. Med. Ctr. v. Robinson*, 876 So. 2d 337, 2004 Miss. LEXIS 778 (Miss. 2004).

Even though a man, who qualified as an "employee" for purposes of Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, caused an accident that injured an individual and then failed to disclose to the individual that he was a county employee, because the individual failed to establish that the county withheld information regarding the employee's work status, did not show that the county had provided the individual with misleading or inaccurate information, and did not exercise due diligence in determining the true parties to the lawsuit or in determining the man's work status, the court affirmed the trial court's grant of summary judgment under Miss. R. Civ. P. 56(c) in favor of the county and the employee, man on the grounds that the individual had failed to substantially comply with the notice requirements of the MTCA, and, that therefore, the statute of limitations had expired. *Ray v. Keith*, 859 So. 2d 995, 2003 Miss. LEXIS 409 (Miss. 2003).

Trial court did not err when, pursuant to Miss. R. Civ. P. 12(b)(6), a patient's complaint against a state hospital and physicians for failure to comply with Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act; the court found that (1) the record did not reflect that the patient had complied with the notice of claim requirements under § 11-46-11(3), and (2) the patient waited for over two years to file his action, which fell outside of the limitations period. *Southern v. Miss. State Hosp.*, 853 So. 2d 1212, 2003 Miss. LEXIS 410 (Miss. 2003).

Because a citizen failed to file a notice of claim against the city pursuant to Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act, and because a document agreed to between the citizen and the city four years earlier did not serve as proper notice, the citizen failed to comply with the Act and the action was properly dismissed under Miss. R. Civ. P. 12(b)(6). *Black v. City of Tupelo*, 853 So. 2d 1221, 2003 Miss. LEXIS 414 (Miss. 2003).

Because parents waited over one year after their son's death to file an action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, against the State and state agencies, and nothing operated to toll the statute of limitations under Miss. Code Ann. § 11-46-11, the action was time-barred and properly dismissed pursuant to Miss. R. Civ. P. 12(b)(6). *Stockstill v. State*, 854 So. 2d 1017, 2003 Miss. LEXIS 449 (Miss. 2003).

Patient in medical malpractice action who underwent surgery, was aware the next day that she had suffered a stroke, and two years after the surgery hand-delivered a letter to two of her treating physicians, as well as filed her initial complaint against a third physician was time-barred from bringing her medical malpractice action. *Gilchrist v. Veach*, 807 So. 2d 485, 2002 Miss. App. LEXIS 79 (Miss. Ct. App. 2002).

A notice of claim was sufficient with regard to a constable, notwithstanding that it misidentified the county for which he was a constable, where the notice of claim was delivered to the county administrator for the county that employed the constable, the constable had been em-

ployed by the county for several years, and it was clear that the county administrator knew of the existence of the constable. *Williams v. Toliver*, 759 So. 2d 1195, 2000 Miss. LEXIS 115 (Miss. 2000).

The trial court was correct in determining that two residents were employees of a state university hospital and that the plaintiff's failure to comply with the result in their dismissal since both doctors were student doctors where one was an intern in his first year of residency and the other was a resident physician in training there; however, the dismissal of a third doctor was premature and further discovery was required to determine whether he was an employee of the hospital or an independent contractor. *Owens v. Thomae*, 759 So. 2d 1117, 1999 Miss. LEXIS 277 (Miss. 1999).

The plaintiff substantially complied with the notice requirements of this section, notwithstanding that the notice of claim was not personally delivered or sent by registered or certified mail, since the defendant school district was not prejudiced by the plaintiff's failure to send her letter in the manner prescribed by statute; the superintendent of the school district was aware of the claim and the matter was already in the hands of the school district's insurance company. *Overstreet v. George County Sch. Dist.*, 741 So. 2d 965, 1999 Miss. App. LEXIS 358 (Miss. Ct. App. 1999).

Despite the fact that the plaintiff's notice of claim letter was sent to the wrong

person and sent via an improper route, she substantially satisfied the notice requirements of this section since she made a reasonable, good faith effort to comply with this section's requirements, the defendant received actual notice of her claim, and the defendant suffered no actual prejudice as a result of the plaintiff's failure to comply with the statute. *McNair v. University of Miss. Med. Ctr.*, 742 So. 2d 1078, 1999 Miss. LEXIS 192 (Miss. 1999).

Where the plaintiff served the mayor of the defendant city with a complaint on April 2, 1997 and with a notice of claim on November 12, 1997 and where the complaint and the notice of claim taken together as a whole outlined each and every aspect required by the statute, she substantially complied with the notice requirement. *Jackson v. City of Booneville*, 738 So. 2d 1241, 1999 Miss. LEXIS 182 (Miss. 1999), overruled in part, *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006).

The court refused to lift statutory immunity in medical malpractice cases against state hospitals, notwithstanding the argument that hospitals should be prevented from claiming immunity merely because they're owned by a governmental entity unless acting in some governmental capacity. *Barnes v. Singing River Hosp. Sys.*, 733 So. 2d 199, 1999 Miss. LEXIS 31 (Miss. 1999), overruled, *Caves v. Yarbrough*, 2007 Miss. LEXIS 614 (Miss. Nov. 1, 2007).

OPINIONS OF THE ATTORNEY GENERAL

The president of the board of supervisors is the chief executive officer for the county for the purpose of giving notice of

claim under the statute. *Creekmore*, August 21, 1998, A.G. Op. #98-0478

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Insufficiency of notice of claim against municipality as regards statement of place where accident occurred. 69 A.L.R.4th 484.

Complaint as satisfying requirement of notice of claim upon states, municipalities, and other political subdivisions. 45 A.L.R.5th 109.

Person or entities upon whom notice of injury or claim against state or state agencies may or must be served. 45 A.L.R.5th 173.

Sufficiency of notice of claim against local governmental unit as regards identity, name, address, and residence of claimant. 53 A.L.R.5th 617.

Sufficiency of notice of claim against

local political entity as regards time when accident occurred. 57 A.L.R.5th 689.

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The History and Future of Sovereign Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

Frasier III, A Review of Issues Presented by § 11-46-11

Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions, 76 Miss. L.J. 973, Spring, 2007.

§ 11-46-13. Jurisdiction; appeals; venue.

(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law.

(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.

HISTORY: Laws, 1984, ch. 495, § 8; reenacted without change, Laws, 1985, ch. 474, § 7; Laws, 1987, ch. 483, § 7; Laws, 1992, ch. 491 § 1; Laws, 1993, ch. 476, § 10, eff from and after passage (approved April 1, 1993).

Editor's Notes — Laws of 1987, ch. 483, § 50, provides as follows:

"SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

JUDICIAL DECISIONS

ANALYSIS

1. Applicability.
2. Venue.
3. Jury trial.

1. Applicability.

In a wrongful death action where the decedent died prior to the enactment of

the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-13 was not applicable because the statute did not contain plain and clearly expressed language that it was to be retroactive. *Boston v. Hartford Accident & Indem. Co.*, 822 So. 2d 239, 2002 Miss. LEXIS 119 (Miss. 2002), overruled in part, *Capital City Ins. Co. v. G.B.*

"Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

2. Venue.

Trial court erred in denying the Mississippi Department of Human Services' (MDHS's) motion for a change of venue, because the venue for suits against MDHS was in the county in which its negligence occurred, and plaintiff alleged no facts showing that any negligent decisions by MDHS occurred in the county where she filed suit, which was where MDHS had its headquarters. *Miss. Dep't of Human Servs. v. S.C.*, 119 So. 3d 1011, 2013 Miss. LEXIS 406 (Miss. 2013).

Miss. Code Ann. § 11-46-13 applied, where the city, a subdivision of the State of Mississippi, was a defendant and, therefore, § 11-46-13 was the controlling venue statute; because the city was wholly situated in Lauderdale County, venue was only proper in Lauderdale County and not in Hinds County, and the suit should have been transferred. *United States Fid. & Guar. Co. v. Moss*, 873 So. 2d 76, 2004 Miss. LEXIS 284 (Miss. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the

action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003).

In an action against the state and two counties to recover for the death of a prisoner who was found hanging by a shoestring in a shower stall in a jail, the state was properly named as a defendant and proper venue was the county in which the prisoner hanged himself. *Estate of Jones v. Quinn*, 716 So. 2d 624, 1998 Miss. LEXIS 296 (Miss. 1998).

3. Jury trial.

Where an appellate court determined that a deputy who assaulted an individual in attempting to force the individual to sit for a casino security photograph, was acting for the casino, and not in his official capacity for the county, the deputy was not entitled to immunity and the individual was entitled to a jury trial. *Kirk v. Crump*, 886 So. 2d 741, 2004 Miss. App. LEXIS 613 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1384 (Miss. 2004).

There is no right to a jury trial under the Tort Claims Act. *Simpson v. City of Pickens*, 761 So. 2d 855, 2000 Miss. LEXIS 133 (Miss. 2000).

RESEARCH REFERENCES

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Immunity for Mississippi School Districts. 58 Miss. L. J. 275, Fall 1988.

§ 11-46-15. Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award.

(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars (\$50,000.00);

(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00);

(c) For claims or causes of action arising from acts or omissions occurring on or after July 1, 2001, the sum of Five Hundred Thousand Dollars (\$500,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

HISTORY: Laws, 1984, ch. 495, § 9; reenacted without change, Laws, 1985, ch. 474, § 8; Laws, 1987, ch. 483, § 8; Laws, 1988, ch. 442, § 5; Laws, 1989, ch. 537, § 5; Laws, 1990, ch. 518, § 5; Laws, 1991, ch. 618, § 5; Laws, 1992, ch. 491 § 2, eff from and after passage (approved May 12, 1992).

Editor's Notes — Laws of 1987, ch. 483, § 50, provides as follows:

"SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed."

Cross References — Definition of "employee," see § 11-46-1.

Waiver of immunity, see § 11-46-5.

Provisions relative to insurance coverage in excess of the maximum liability set forth in this section and waiver of such maximum, see § 11-46-17.

Limitations of liability provided herein also available to emergency 911 telephone service suppliers operating within state, see § 19-5-361.

JUDICIAL DECISIONS

ANALYSIS

1. Interest.
2. Interpretation.
3. Joint liability.
4. Governmental immunity.
5. Determination of damages.

1. Interest.

In a medical malpractice case filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., both parties agreed that pre-judgment interest was improperly awarded under Miss. Code Ann. § 11-46-15. Univ. of Miss. Med. Ctr.

v. Pounders, 970 So. 2d 141, 2007 Miss. LEXIS 691 (Miss. 2007).

2. Interpretation.

Post-judgment interest over and above the statutory cap may be awarded against a governmental entity because such is not excluded under Miss. Code Ann. § 11-46-15(2). Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

A thorough review of Miss. Code Ann. § 1-3-33 and the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., revealed that there was no contrary

intent manifested by the Legislature that meant that the MTCA should be interpreted only in the singular manner; Miss. Code Ann. § 11-46-15(1) was interpreted by using singular or plural language. *Miss. DOT v. Allred*, 928 So. 2d 152, 2006 Miss. LEXIS 114 (Miss. 2006).

This section does not bar the award of postjudgment interest against a governmental entity. *City of Jackson v. Williamson*, 740 So. 2d 818, 1999 Miss. LEXIS 89 (Miss. 1999).

3. Joint liability.

In an action against a city and the plaintiff's underinsured motorist carrier arising from a motor vehicle accident involving a police officer, since the maximum amount recoverable from the defendant city was \$50,000, a judgment in excess of \$100,000 was reformed to provide that the insurance carrier was liable for its \$50,000 policy and that the city was liable for \$50,000. *City of Jackson v. Perry*, 764 So. 2d 373, 2000 Miss. LEXIS 107 (Miss. 2000).

4. Governmental immunity.

Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-15(2) bars assessment of punitive damages against state agencies. *Claiborne v. Miss. Bd. of Pharm.*, 2011 U.S. Dist. LEXIS 93849 (S.D. Miss. Aug. 22, 2011).

A review of the agreement between the non-governmental entity and the community hospital indicated that the entity was an instrumentality of the nursing home. As an "instrumentality" of a community hospital, the entity was entitled to the protections, limitations, and immunities of the Mississippi Tort Claims Act. *Fedrick v. Quorum Health Res., Inc.*, 45 So. 3d 667, 2009 Miss. App. LEXIS 926 (Miss. Ct. App. 2009).

In plaintiff's 42 U.S.C.S. § 1983 suit, plaintiff's claims for punitive damages failed under Miss. Code Ann. § 11-46-15(2) and because the 42 U.S.C.S. § 1983 claims against the county failed as a matter of law. *Grosch v. Tunica County*, 2008 U.S. Dist. LEXIS 12736 (N.D. Miss. Feb. 4, 2008).

Medical center was an instrumentality of the community hospital as the hospital

had nearly total interest in the income and losses of the medical center and majority control over the center's Executive Committee membership, which clearly qualified the hospital as an intermediary or agent through which certain functions of the hospital were accomplished; therefore, the medical center was an instrumentality of the hospital and as an instrumentality, the center was entitled to the protections, limitations and immunities of the Mississippi Tort Claims Act. *Bolivar Leflore Med. Alliance, LLP v. Williams*, 938 So. 2d 1222, 2006 Miss. LEXIS 536 (Miss. 2006).

Mississippi is a single occurrence state where liability per occurrence is limited to a statutory amount or the policy limits for any excess coverage purchased to cover such claims; therefore the district court did not err in enjoining the driver to abandon further efforts to recover from appellees after \$50,000 was interpleaded into the court's registry. *Allred v. Yarborough*, 843 So. 2d 727, 2003 Miss. LEXIS 199 (Miss. 2003).

Miss. Code Ann. § 11-46-15, provides that no governmental body, or employee thereof, may be held liable for punitive damages in any action in the courts of the State of Mississippi; thus, a resident's claims for punitive damages from a county were barred. *Madison v. DeSoto County*, 822 So. 2d 306, 2002 Miss. App. LEXIS 82 (Miss. Ct. App. 2002).

5. Determination of damages.

In a claim against the city under the Mississippi Tort Claims Act for plaintiffs' damages resulting from a collision with a suspect's vehicle involved in a high speed pursuit by a police officer, substantial evidence did not support the trial court's finding that the suspect's actions were not a proximate contributing cause of the accident and constituted zero percent of the injuries sustained by plaintiffs because the suspect prompted the pursuit, and his vehicle actually collided into the one occupied by plaintiffs. *City of Jackson v. Lewis*, 153 So. 3d 689, 2014 Miss. LEXIS 580 (Miss. 2014).

Because a decedent began to decline in physical and mental health shortly after a fall upon exiting a city transport bus that

sent the decedent to a hospital, and an expert causally linked the deterioration and rising medical costs to a city's negligent act, the estate administrator was awarded damages of \$250,000 under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-15(1)(b). *City of Jackson v. Estate of Stewart*, 48 So. 3d 502, 2010 Miss. LEXIS 541 (Miss. 2010).

There was sufficient evidence to support a wrongful death judgment against a hospital under the Mississippi Tort Claims Act based on medical malpractice where an expert testified that the hospital failed to turn the patient, failed to properly treat a decubitus ulcer, and failed to make sure the patient had proper nutrition and hydration; moreover, the expert testified

that sepsis from the ulcer was the cause of death, and considering the size of the wound and the amount of pain and suffering, a million dollar judgment was not outrageous. *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500, 2007 Miss. LEXIS 517 (Miss. 2007).

In a child's suit against the Mississippi DHS, the record failed to indicate how a trial court reached the figure of \$750,000 damage award; the trial judge found that DHS had breached duties towards the child, but there was no finding in the record as to what damages were attributable to which breach. *Miss. Dep't of Human Servs. v. S.W.*, 974 So. 2d 253, 2007 Miss. App. LEXIS 503 (Miss. Ct. App. 2007).

OPINIONS OF THE ATTORNEY GENERAL

County boards of supervisors may, within limits prescribed by Section 11-46-15, settle claims for property damage and injuries sustained from accidents involving county owned and operated equipment without necessity for enactment of local and private legislation by Legislature. *Compretta*, Feb. 16, 1994, A.G. Op. #94-0058.

A private insurer should not be called upon to pay any judgment in excess of the amount established by Section 11-46-15, as no such judgment will survive the mandated judicial intervention. *Hardy*, February 16, 1996, A.G. Op. #96-0053.

The Pat Harrison Waterway District is immune from any liability exceeding the statutory maximum provided for by this section for negligent acts, although the question of whether ticket purchases may

create contractual liability that would not be limited by sovereign immunity remains open to future interpretation. *Matthews*, July 18, 1997, A.G. Op. #97-0391.

Provided the mandates of the Tort Claims Act have been met and upon the advice and consent of its insurance carrier, or administrator if self-insured, a county school board may settle valid claims for property damage and personal injury upon proper resolution spread on the minutes. *Adams*, Mar. 8, 2002, A.G. Op. #02-0087.

The Mississippi Military Department is authorized to purchase liability insurance to cover claims in excess of the amounts provided in the Tort Claims Act, as long as the purchase of such coverage is made in accordance with the provisions of the Act. *Majors*, Sept. 29, 2006, A.G. Op. 06-0484.

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§ 11-46-16. Expired.

Expired by operation of law, eff from and after July 1, 1993 as to the state, and from and after October 1, 1995 as to political subdivisions.

[Laws, 1990, ch. 518, § 6; Laws, 1992, ch. 491 § 7; Laws, 1992 Special Session, ch. 3, § 3, eff from and after passage (approved September 16, 1992).]

Editor's Notes — Former § 11-46-16 pertained to authority of governmental entities to purchase liability insurance, and immunity from liability to the extent of such coverage.

This section expired pursuant to the terms of former subsection (4), which provided that “this section shall be of no force or effect from and after July 1, 1993, as to the state and from and after October 1, 1993, shall be of no force or effect as to political subdivisions.”

§ 11-46-17. Creation of Tort Claims Fund; liability insurance.

(1) There is hereby created in the State Treasury a special fund to be known as the “Tort Claims Fund.”

All monies that the Department of Finance and Administration receives and collects under the provisions of subsection (2) of this section and all funds that the Legislature appropriates for use by the board in administering the provisions of this chapter shall be deposited in the fund. All monies in the fund may be expended by the board for any and all purposes for which the board is authorized to expend funds under the provisions of this chapter. All interest earned from the investment of monies in the fund shall be credited to the fund. Monies remaining in the fund at the end of a fiscal year shall not lapse into the State General Fund.

(2) From and after July 1, 1993, each governmental entity other than political subdivisions shall participate in a comprehensive plan of self-insurance or one or more policies of liability insurance or combination of the two (2), all to be administered by the Department of Finance and Administration. The plan shall provide coverage to each of such governmental entities for every risk for which the board determines the respective governmental entities to be liable in the event of a claim or suit for injuries under the provisions of this chapter, including claims or suits for injuries from the use or operation of motor vehicles; the board may allow the plan to contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to governmental entities. The plan may also provide coverage for liabilities outside the provisions of this chapter, including, but not limited to, liabilities arising from Sections 1983 through 1987 of Title 42 of the United States Code and liabilities from actions brought in foreign jurisdictions, and the board shall establish limits of coverage for such liabilities. Each governmental entity participating in the plan shall make payments to the board in such amounts, times and manner determined by the board as the board deems necessary to provide sufficient funds to be available for payment by the board of the costs it incurs in providing coverage for the governmental entity. Each governmental entity of the state other than the political subdivisions thereof participating in the plan procured by the board shall be issued by the board a certificate of coverage whose form and content shall be determined by the board but which shall have the effect of certifying that, in the opinion of the board, each of such governmental entities is adequately insured.

Before July 1, 1993, the Board of Trustees of State Institutions of Higher Learning may provide liability coverage for each university, department, trustee, employee, volunteer, facility and activity as the board of trustees, in its discretion, shall determine advisable. If liability coverage, either through insurance policies or self-insurance retention is in effect, immunity from suit shall be waived only to the limit of liability established by the insurance or self-insurance program. From and after July 1, 1993, liability coverage established by the board of trustees must conform to the provisions of this section and must receive approval from the board. Should the board reject a plan, the board of trustees shall participate in the liability program for state agencies established by the board.

(3) All political subdivisions shall, from and after October 1, 1993, obtain a policy or policies of insurance, establish self-insurance reserves, or provide a combination of insurance and reserves as necessary to cover all risks of claims and suits for which political subdivisions may be liable under this chapter; a political subdivision shall not be required to obtain pollution liability insurance. However, this shall not limit any cause of action against a political subdivision relative to limits of liability under the Tort Claims Act. The policy or policies of insurance or self-insurance may contain any reasonable limitations or exclusions not contrary to Mississippi state statutes or case law as are normally included in commercial liability insurance policies generally available to political subdivisions. All the plans of insurance or reserves or combination of insurance and reserves shall be submitted for approval to the board. The board shall issue a certificate of coverage to each political subdivision whose plan it approves in the same manner as provided in subsection (2) of this section. Whenever any political subdivision fails to obtain the board's approval of its plan, the political subdivision shall act in accordance with the rules and regulations of the board and obtain a satisfactory plan of insurance or reserves or combination of insurance and reserves to be approved by the board.

(4) Any governmental entity may purchase liability insurance to cover claims in excess of the amounts provided for in Section 11-46-15 and may be sued by anyone in excess of the amounts provided for in Section 11-46-15 to the extent of the excess insurance carried; however, the immunity from suit above the amounts provided for in Section 11-46-15 shall be waived only to the extent of excess liability insurance carried.

(5) Any two (2) or more political subdivisions may contract to pool their liabilities as a group under this chapter. The pooling agreements and contracts may provide for the purchase of one or more policies of liability insurance or the establishment of self-insurance reserves or a combination of insurance and reserves and shall be subject to approval by the board in the manner provided in subsections (2) and (3) of this section.

(6) The board shall have subrogation rights against a third party for amounts paid out of any plan of self-insurance administered by the board pursuant to this section on behalf of a governmental entity that is not a political subdivision as a result of damages caused under circumstances

creating a cause of action in favor of such governmental entity against a third party. The board shall deposit in the Tort Claims Fund all monies received in connection with the settlement or payment of any claim, including proceeds from the sale of salvage.

(7) During fiscal year 2017, the board shall have full authority to assess agencies and governmental entities as per Section 11-46-19(1)(r).

HISTORY: Laws, 1984, ch. 495; reenacted and amended, Laws, 1985, ch. 474, § 9; reenacted and amended, Laws, 1986, ch. 438, § 4; Laws, 1987, ch. 483, § 9; Laws, 1988, ch. 442, § 6; Laws, 1988, ch. 479, § 4; Laws, 1989, ch. 537, § 6; Laws, 1990, ch. 518, § 7; Laws, 1991, ch. 618, § 7; Laws, 1992, ch. 491 § 8; Laws, 1993, ch. 476, § 6; Laws, 1995, ch. 568, § 1; Laws, 1996, ch. 377, § 1; Laws, 1998, ch. 496, § 1; Laws, 2013, ch. 385, § 2; Laws, 2016, ch. 459, § 66; Laws, 2017, 1st Ex Sess, ch. 7, § 10, *eff from and after passage* (approved June 23, 2017).

Editor's Notes — Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

Laws of 2013, ch. 385, § 6, effective March 20, 2013, provides:

“SECTION 6. This act shall take effect and be in force from and after its passage [approved March 20, 2013]; volunteer fire departments shall have until July 1, 2013, to obtain and have approved the insurance policies of self-insurance reserves or combination thereof required for political subdivisions under the Tort Claims Act.”

Laws of 2016, ch. 459, § 1, codified as § 27-104-201, provides:

“SECTION 1. This act shall be known and may be cited as the ‘Mississippi Budget Transparency and Simplification Act of 2016.’”

Cross References — Duty of government entity to indemnify and/or defend claim on behalf of employee where such entity has certificate of coverage issued under this section, see § 11-46-7.

Reduction of verdicts which, together with costs and fees, exceed \$500,000, see § 11-46-15.

Survey of political subdivisions that might be interested in a comprehensive plan liability insurance, see § 11-46-19.

Hiring of administrator for comprehensive plan of self-insurance and/or policies of liability insurance, see § 11-46-19.

Power and duty of Executive Director of Department of Finance and Administration to coordinate and administer liability plans authorized in this section, see § 27-104-31.

Liability insurance for community hospitals, see § 41-13-11.

Prohibition against one state agency charging another state agency fees, etc., for services or resources received, see § 27-104-203.

Defrayal of expenses of certain state agencies by appropriation of Legislature from General Fund, see § 27-104-205.

Federal Aspects— Federal laws pertaining to actions for violations of certain laws and deprivation of civil rights, see 42 USCS §§ 1983-1987.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Construction with other laws.
3. Waiver for excess liability.

1. In general.

Where plaintiff parent sued defendant school district in state court alleging her child was sexually assaulted at school and obtained a judgment under the Mississippi Tort Claims Act, her later claims in federal court were properly held as barred due to *res judicata*; while school districts' sources of funding under Miss. Code Ann. § 37-45-21, 37-47-1 et seq., Miss. Code Ann. § 37-57-1, Miss. Code Ann. § 37-59-3, and Miss. Code Ann. § 37-151-7 were equally divided between local school districts and the state under Miss. Code Ann. § 11-46-7, Miss. Code Ann. § 11-46-16(2), and Miss. Code Ann. § 11-46-17(2), any judgment against the school district would be paid through the Tort Claims Fund and excess liability insurance, and thus, the school district was not considered an arm of the state entitled to Eleventh Amendment immunity. *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 2006 U.S. App. LEXIS 21259 (5th Cir. Miss. 2006).

The purchase of insurance by a school district under subsection (4) of this section does not limit the exclusions or exemptions enumerated in § 11-46-9. *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136, 1999 Miss. LEXIS 273 (Miss. 1999), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 2011 Miss. LEXIS 609 (Miss. Oct. 20, 2011), overruled in part, *Miss. Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012).

The purchase of insurance waives sovereign immunity to extent of the policy. *L.W. v. McComb Separate Mun. Sch. Dist.*, 1999 Miss. LEXIS 128 (Miss. Mar. 31,

1999), op. withdrawn, sub. op., 754 So. 2d 1136, 1999 Miss. LEXIS 273 (Miss. 1999).

Mississippi Municipal Liability Plan of self-insurance, authorized by § 11-46-17(5), is not "insurance" within meaning of § 83-11-103(c)(i), which defines uninsured motor vehicle to include vehicle to which there is no bodily injury liability insurance. *Coleman v. American Mfrs. Mut. Ins. Co.*, 930 F. Supp. 255, 1996 U.S. Dist. LEXIS 8961 (N.D. Miss. 1996).

2. Construction with other laws.

Defense costs eroded a community hospital's insurance policy's coverage limits because (1) the policy so stated, (2) public policy did not bar the provision, as public policy did not bar a defense-within-limits policy, and Miss. Code Ann. §§ 41-13-11 and 11-46-17(3) created no such public policy, and (3) a defense-within-limits clause was not unenforceable for not being placed on the hospital's board's minutes. *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 2017 U.S. App. LEXIS 3742 (5th Cir. Miss. 2017).

The purchase of liability insurance by a governmental entity under this section does not limit the exclusions or exemptions enumerated in § 11-46-9. *Leslie v. City of Biloxi*, 758 So. 2d 430, 2000 Miss. LEXIS 87 (Miss. 2000).

3. Waiver for excess liability.

Mississippi Municipality Liability Plan (MMLP) could not be liable to the individuals bringing tort claims for injuries, incurred in an auto accident with a city police officer, of up to the \$500,000 policy limits in the city's policy, where participation in the MMLP was considered to be participation in a risk-sharing pool and was not, under Miss. Code Ann. § 11-46-17(4), the same as obtaining liability insurance. *Miss. Mun. Liab. Plan v. Jordan*, 863 So. 2d 934, 2003 Miss. LEXIS 875 (Miss. 2003).

OPINIONS OF THE ATTORNEY GENERAL

Mississippi Industries for the Blind is state agency and therefore is subject to

Tort Claims Act. *Williams*, Jan. 24, 1994, A.G. Op. #93-0984.

Decision by state agency to discontinue excess insurance is an "administrative call". Williams, Jan. 24, 1994, A.G. Op. #93-0984.

The District Attorney may use bad check funds to purchase insurance covering his office for liability for such federal law claims not covered by the Tort Claims Fund. Harkey, April 27, 1995, A.G. Op. #95-0130.

Planning and development districts do not constitute political subdivisions for purposes of the Tort Claims Act. Hardy, Nov. 7, 1997, A.G. Op. #97-0701.

Municipalities may insure themselves only for claims for which they are liable; the police and fire protection exemption under Section 11-46-9 specifically bars claims against municipalities and the city of Jackson may not gratuitously provide coverage. Tedder, March 13, 1998, A.G. Op. #98-0133.

A water supply district is required by subsection (2) to participate in a plan of self-insurance or to purchase liability insurance, both as administered by the Tort Claims Board. Tohill, Nov. 19, 1999, A.G. Op. #99-0621.

A water supply district has the authority to purchase excess liability insurance with a deductible per occurrence in the amount of the current statutory limitation of liability. Tohill, Nov. 19, 1999, A.G. Op. #99-0621.

A regional medical center, a public hospital owned by a county, is covered under the Tort Claims Act. Brown, Apr. 26, 2002, A.G. Op. #02-0211.

Members or employees of the Pat Harrison Waterway District acting in the course and scope of their employment in federal actions sounding in tort subject to the current liability cap provided by this section. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

The Pat Harrison Waterway District may not purchase liability insurance to cover tort claims for amounts under the statutory cap, but may purchase excess liability policies to cover federal actions or other claims sounding in tort that exceed the liability cap. Matthews, Dec. 6, 2002, A.G. Op. #02-0686.

The Northeast Mississippi Solid Waste Management Authority must provide coverage for the Authority and hence the Authority's Board of Commissioners pursuant to this section. Hatcher, Jan. 23, 2004, A.G. Op. 03-0655.

Existing public liability coverage of the elected officials who are representatives of their particular bodies on the Board of Commissioners does not suffice for public official liability for the Northeast Mississippi Solid Waste Management Authority. The Authority must provide coverage under the Tort Claims Act for the Authority and for those officials as Commissioners. Hatcher, Jan. 23, 2004, A.G. Op. 03-0655.

The Northeast Mississippi Solid Waste Management Authority may not drop the required tort claims coverage for any of its commissioners. Hatcher, Jan. 23, 2004, A.G. Op. 03-0655.

Where an "insurance" pool paid an amount to the claimant, and the claimant accepted that payment, and executed a release or waiver in favor of the city, once such a settlement was accepted, the claimant was barred from making any additional claim for damages. To preserve the right to pursue the full amount claimed, the claimant should have refused the settlement tendered by the pool. Thus, as there remains no further legal obligation, the city cannot now supplement the amount accepted by the claimant from the insurance pool in settlement of the claim. McLaurin, July 16, 2004, A.G. Op. 04-0251.

RESEARCH REFERENCES

ALR.

Amount of appropriation as limitation on damages for breach of contract recoverable by one contracting with government agency. 40 A.L.R.4th 998.

Reviewability before trial of order denying qualified immunity to defendant sued

in state court under 42 USCS § 1983. 49 A.L.R.5th 717.

Duty of liability insurer to initiate settlement negotiations. 51 A.L.R.5th 701.

Requirement that multicoverage umbrella insurance policy offer uninsured-or underinsured-motorist coverage equal to

liability limits under umbrella provisions.
52 A.L.R.5th 451.

§ 11-46-18. Mississippi Tort Claims Board; membership; payment of expenses; officers; meetings.

(1) There is created a board which shall be known as the Mississippi Tort Claims Board. The board shall consist of seven (7) members as follows:

(a) The Governor, subject to the advice and consent of the Senate, shall appoint one (1) member who shall serve at the will and pleasure of the Governor and who shall serve as chairman of the board.

(b) The Director of the Department of Environmental Quality or a designee.

(c) The Commissioner of Insurance or a designee.

(d) The Director of the Department of Finance and Administration or a designee shall be a member of the board, shall serve as the executive director to the board, and shall be authorized to conduct the administrative affairs of the board.

(e) The Attorney General or a designee.

(f) The Commissioner of Public Safety or a designee.

(g) The State Treasurer or a designee.

(2) The member of the board appointed by the Governor shall receive per diem as provided by Section 25-3-69 and reimbursement of travel expenses as provided in Section 25-3-41 for expenses incurred in carrying out his duties as a member of the Mississippi Tort Claims Board.

(3) The board, by majority vote, shall determine the place and time of its meetings and shall spread the same on its minutes. A majority of the members shall constitute a quorum, and final action of the board shall require the affirmative vote of a majority of those present and voting. The board shall elect a vice chairman who shall preside in the absence or incapacity of the chairman and such other officers as it deems necessary and as established by its rules of order. Extraordinary meetings may be held upon call of the chairman or upon petition of any four (4) members of the board should the chairman refuse to call a meeting. The initial meeting of the board shall convene upon call of the chairman.

(4) The Lieutenant Governor may designate one (1) Senator and the Speaker of the House of Representatives may designate one (1) Representative to attend any meeting of the Tort Claims Board. The appointing authorities may designate alternate members from their respective houses to serve when the regular designees are unable to attend such meetings of the board. Such legislative designees shall have no jurisdiction or vote on any matter within the jurisdiction of the board. For attending meetings of the board, such legislators shall receive per diem and expenses which shall be paid from the contingent expense funds of their respective houses in the same amounts as provided for committee meetings when the Legislature is not in session; however, no per diem and expenses for attending meetings of the board will be paid while the Legislature is in session. No per diem and expenses will be paid,

except for attending meetings of the board, without prior approval of the proper committee in their respective houses.

(5) If a member of the board appoints a designee to attend meetings of the board on the member's behalf, the member must inform the chairman of the board in writing of the name and contact information of the designee.

(6) The designee of any member of the board is authorized to take all action which the person making the designation is authorized to do under this chapter.

HISTORY: Laws, 1993, ch. 476, § 7; Laws, 1994, ch. 568, § 2; Laws, 2017, ch. 366, § 1, eff from and after July 1, 2017.

§ 11-46-19. Powers and duties of board.

(1) The board shall have the following powers:

(a) To provide oversight over the Tort Claims Fund;

(b) To approve any award made from the Tort Claims Fund;

(c) To pay all necessary expenses attributable to the operation of the Tort Claims Fund from such fund;

(d) To assign litigated claims against governmental entities other than political subdivisions to competent attorneys unless such governmental entity has a staff attorney who is competent to represent the governmental entity and is approved by the board; the board shall give primary consideration to attorneys practicing in the jurisdiction where the claim arose in assigning cases; attorneys hired to represent a governmental entity other than a political subdivision shall be paid according to the department fee schedule;

(e) To approve all claimants' attorney fees in claims against the state;

(f) To employ on a full-time basis a staff attorney who shall possess the minimum qualifications required to be a member of The Mississippi Bar, and such other staff as it may deem necessary to carry out the purposes of this chapter; the employees in the positions approved by the board shall be hired by the director, shall be employees of the department, and shall be compensated from the Tort Claims Fund;

(g) To contract with one or more reputable insurance consulting firms as may be necessary;

(h) To purchase any policies of liability insurance and to administer any plan of self-insurance or policies of liability insurance required for the protection of the state against claims and suits brought under this chapter;

(i) To expend money from the Tort Claims Fund for the purchase of any policies of liability insurance and the payment of any award or settlement of a claim against the state under the provisions of this chapter or of a claim against any school district, junior college or community college district, or state agency, arising from the operation of school buses or other vehicles, under the provisions of Section 37-41-42;

(j) To cancel, modify or replace any policy or policies of liability insurance procured by the board;

(k) To issue certificates of coverage to governmental entities, including any political subdivision participating in any plan of liability protection approved by the board;

(l) To review and approve or reject any plan of liability insurance or self-insurance reserves proposed or provided by political subdivisions if such plan is intended to serve as security for risks of claims and suits against them for which immunity has been waived under this chapter;

(m) To administer disposition of claims against the Tort Claims Fund;

(n) To withhold issuance of any warrants payable from funds of a participating state entity should such entity fail to make required contributions to the Tort Claims Fund in the time and manner prescribed by the board;

(o) To develop a comprehensive statewide list of attorneys who are qualified to represent the state and any employee thereof named as a defendant in a claim brought under this chapter against the state or such employee;

(p) To develop a schedule of fees for paying attorneys defending claims against the state or an employee thereof;

(q) To adopt and promulgate such reasonable rules and regulations and to do and perform all such acts as are necessary to carry out its powers and duties under this chapter;

(r) To establish and assess premiums to be paid by governmental entities required to participate in the Tort Claims Fund;

(s) To contract with a third-party administrator to process claims against the state under this chapter;

(t) To annually submit its budget request to the Legislature as a state agency;

(u) To dispose of salvage obtained in settlement or payment of any claim at fair market value by such means and upon such terms as the board may think best; and

(v) [Repealed]

(2) Policies of liability insurance purchased for the protection of governmental entities against claims and suits brought under this chapter shall be purchased pursuant to the competitive bidding procedures set forth in Section 31-7-13.

(3) The department shall have the following powers and duties:

(a) To annually report to the Legislature concerning each comprehensive plan of liability protection established pursuant to Section 11-46-17(2). Such report shall include a comprehensive analysis of the cost of the plan, a breakdown of the cost to participating state entities, and such other information as the department may deem necessary.

(b) To provide the board with any staff and meeting facilities as may be necessary to carry out the duties of the board as provided in this chapter.

(c) To submit the board's budget request for the initial year of operation of the board in order to authorize expenditures for the 1993-1994 fiscal year and for the appropriation of such general funds as shall be required for the commencement of its activities.

HISTORY: Laws, 1984, ch. 495, § 11; reenacted and amended, Laws, 1985, ch. 474, § 10; Laws, 1987, ch. 483, § 10; Laws, 1988, ch. 442, § 7; Laws, 1988, ch. 479, § 5; Laws, 1993, ch. 476, § 8; Laws, 1995, ch. 568, § 2; Laws, 1996, ch. 428, § 2; Laws, 2003, ch. 560, § 5; reenacted and amended, Laws, 2005, ch. 539, § 5; Laws, 2006, ch. 567, § 6, eff from and after passage (approved Apr. 24, 2006).

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a publishing error in the introductory language and former second version of this section. The words “Until July 1, 2005, this section shall read as follows.” was deleted and also the second tier of the section was deleted. The Joint Committee ratified the correction at its July 8, 2004, meeting.

Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in a statutory reference at the end of (1)(v). The Section “83-48-6(i)” was changed to “83-48-5(6)(i).” The Joint Committee ratified the correction at its May 31, 2006, meeting.

Editor’s Notes — Section 37-41-42 referred to in (1)(i) was repealed by Laws of 1996, ch. 428, § 1, eff June 30, 1997.

Subsection (1)(v), which authorized the board to administer the Medical Malpractice Insurance Availability Plan, was repealed by its own terms effective July 1, 2008.

Laws of 1987, ch. 483, § 50, provides as follows:

“SECTION 50. Section 4, Chapter 495, Laws of 1984, as reenacted and amended by Section 12, Chapter 474, Laws of 1985, as amended by Section 6, Chapter 438, Laws of 1986, which specifies the causes of action that are covered by Chapter 46, Title 11, Mississippi Code of 1972, and specifies the law that governs causes of action that occur prior to the effective date of coverage of Chapter 46, Title 11, Mississippi Code of 1972, is hereby repealed.”

Cross References — Medical Malpractice Insurance Availability Act, see §§ 83-48-1 et seq.

RESEARCH REFERENCES

ALR.

Duty of liability insurer to initiate settlement negotiations. 51 A.L.R.5th 701.

§ 11-46-20. Tort Claims Board; regulation of liability coverage of governmental entities; annual review of insurance plans; other powers; fees.

(1) The Tort Claims Board shall be charged with the responsibility to regulate all liability coverage of governmental entities required to have certificates of coverage under this chapter which elect to provide the same through a public entity group or individual self-insurance program. This regulation shall be accomplished through an initial approval as provided in Section 11-46-17 and by ongoing or annual review. Each self-insurance program shall annually submit to the Tort Claims Board the following items within ninety (90) days from the end of the group year:

- (a) An audited financial statement;
- (b) An actuarial valuation;
- (c) Contracts with third-party administrators (if any);
- (d) Excess insurance policies;

(e) A list of members and premiums due from and collected from each member; and

(f) Other data as may be required by the Tort Claims Board.

(2) Areas of regulation under this section shall include, but not be limited to, the following:

- (a) Financial solvency;
- (b) Rating plans, rates and rating basis;
- (c) Assessment plans of public entity groups;
- (d) Coverages offered and excluded;
- (e) Deductibles and deductible credits;
- (f) Proper purchase of excess insurance or reinsurance; and
- (g) Review of losses, reserves and expenses annually.

(3) Individual self-insurers and group public entity self-insurers must provide the data requested for the purposes of this section in order to receive continuing approval of the Tort Claims Board and issuance of annual certificates of coverage to the governmental entities involved.

(4) The Tort Claims Board is authorized to assess and charge appropriate fees for the costs of regulation, as determined by the board, to the individual self-insurers and group public entity self-insurers being regulated.

(5) The Tort Claims Board is empowered to:

- (a) Issue cease and desist orders;
- (b) Require rate increases or decreases;
- (c) Require assessments of members of group public entity self-insurers in such amounts as are authorized and required by the board;
- (d) Require changes in excess insurance or reinsurance; or
- (e) Take such other actions as deemed necessary by the board to carry out the provisions of this chapter.

HISTORY: Laws, 1994, ch. 568, § 1, eff from and after passage (approved April 7, 1994).

RESEARCH REFERENCES

ALR.

Requirement that multicoverage umbrella insurance policy offer uninsured-or

underinsured-motorist coverage equal to liability limits under umbrella provisions. 52 A.L.R.5th 451.

§ 11-46-21. Repealed.

Repealed by Laws of 1996, ch. 428, § 3, eff from and after passage (approved March 25, 1996).

[Laws, 1984, ch. 495, § 12; Laws, 1985, ch. 474, § 11; Laws, 1986, ch. 438, § 5; Laws, 1987, ch. 483, § 11; Laws, 1988, ch. 442, § 8; Laws, 1989, ch. 537, § 7; Laws, 1990, ch. 518, § 8; Laws, 1992, ch. 491 § 9; Laws, 1993, ch. 476, § 9; Laws, 1994, ch. 617, § 2]

Editor's Notes — Former § 11-46-21 was entitled: Transfer of funds from Accident Contingent Fund and Tort Claims Fund to Accident Contingent Tort Fund.

§ 11-46-23. Provisions of chapter independent and severable.

If any provision or clause of Chapter 46, Title 11, Mississippi Code of 1972, or application thereof is held invalid or unenforceable for any reason, such holding shall have no effect on any other provisions or applications of Chapter 46, Title 11, Mississippi Code of 1972, and to this end the provisions of Chapter 46, Title 11, Mississippi Code of 1972, are declared to be severable.

HISTORY: Laws, 1993, ch. 476, § 11, eff from and after passage (approved April 1, 1993).

CHAPTER 47.

LIS PENDENS

Sec.

- 11-47-1. Record to be kept by chancery clerk.
- 11-47-3. Notice of suit affecting real estate recorded.
- 11-47-5. Notice by officer levying on real estate.
- 11-47-7. Clerk to index the record.
- 11-47-9. Effect of failure to enter notice.
- 11-47-11. Result of proceeding entered.
- 11-47-13. Liability of a clerk, sheriff, or other officer.
- 11-47-15. Form of the docket.

§ 11-47-1. Record to be kept by chancery clerk.

The clerk of the chancery court shall keep in his office, as a public record, a suitable book, to be called the "Lis Pendens Record."

HISTORY: Codes 1892, § 2782; 1906, § 3147; Hemingway's 1917, § 2498; 1930, § 2324; 1942, § 754.

Cross References — Fees for chancery clerk, see §§ 25-7-9, 25-7-13.

Complaints and orders filed in slum clearance proceedings, see § 43-35-109.

Soil conservation contracts, see § 69-27-207.

Notice by unsecured creditors to subject decedent's realty to liability, see § 91-7-91.

RESEARCH REFERENCES

ALR.

Duration of operation of lis pendens as dependent upon diligent prosecution of suit. 8 A.L.R.2d 986.

Propriety of filing of lis pendens in ac-

tion affecting leasehold interest. 67 A.L.R.3d 747.

Lis pendens suit to compel stock transfer. 48 A.L.R.4th 731.

§ 11-47-3. Notice of suit affecting real estate recorded.

When any person shall begin a suit in any court, whether by declaration or bill, or by cross-complaint, to enforce a lien upon, right to, or interest in, any real estate, unless the claim be founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county in which the real estate is situated, such person shall file with the clerk of the chancery court of each county where the real estate, or any part thereof, is situated, a notice containing the names of all the parties to the suit, a description of the real estate, and a brief statement of the nature of the lien, right, or interest sought to be enforced. The clerk shall immediately file and record the notice in the lis pendens record, and note on it, and in the record, the hour and day of filing and recording.

HISTORY: Codes, 1892, § 2783; 1906, § 3148; Hemingway's 1917, § 2499; 1930, § 2325; 1942, § 755.

Cross References — Filing lis pendens notice in eminent domain proceedings, see § 11-27-7.

Lien of laborers, materialmen, architects, engineers, etc. see §§ 85-7-131 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Notice in general.
3. —Description of realty.
4. Encumbrancers and purchasers pending suit.
5. Rights and liabilities of purchasers pending suit.

1. In general.

Filing of lis pendens notice was privileged communication and therefore not actionable for slander of title, where chancellor expressly found that persons alleging easement rights in underground conduit that drained their land had right to assert such interest. *Dethlefs v. Beau Maison Dev. Corp.*, 511 So. 2d 112, 1987 Miss. LEXIS 2629 (Miss. 1987).

An action to set aside a deed on certain property on the basis of fraud under Code § 11-5-75 was not barred by a former action to place a lis pendens notice on the same property pursuant to Code § 11-47-3, where not only were these two causes of action grounded in different statutes but they also involved entirely different classes of litigants, inasmuch as the lis pendens statute was enacted for those who claimed to rightfully own an interest in the property and the statute permitting an attack on fraudulent conveyances was devised for the protection of creditors who had no specific interest in the land. *Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So. 2d 749, 1982 Miss. LEXIS 2314 (Miss. 1982).

In an action by the purchaser of a house for specific performance or a money decree arising out of the failure of the corporate defendant to complete the house and premises as agreed, the chancellor erred in his final decree in failing to expunge a lis pendens notice placed on property owned by the corporation and located beside that owned by the plaintiffs where the next-door property was not involved in the money decree against the corporate

defendant. *W. H. Hopper & Associates, Inc. v. Dunaway*, 396 So. 2d 43, 1981 Miss. LEXIS 1982 (Miss. 1981).

Notice of pendency of foreclosure suit will be imputed to assignee of judgment against mortgagor before Code 1892 became operative, without lis pendens notice. *Smith v. Munger*, 93 Miss. 627, 47 So. 676, 1908 Miss. LEXIS 160 (Miss. 1908).

Pendency of suit to foreclose mortgage is constructive notice to all parties. *Alabama & V. R. Co. v. Thomas*, 86 Miss. 27, 38 So. 770, 1905 Miss. LEXIS 81 (Miss. 1905).

Code 1892, § 503, pertaining to creditors' bills to vacate fraudulent conveyances and providing for a lien in favor of creditor upon the filing of a bill except as to bona fide purchasers before service of process on defendant, is not affected by the chapter on lis pendens. *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502, 1904 Miss. LEXIS 134 (Miss. 1904).

Prior to this act, mere pendency of suit concerning land was noticed to a purchaser of the timber thereon of the rights of complainant. *Alliance Trust Co. v. Nettleton Hardwood Co.*, 74 Miss. 584, 21 So. 396, 1896 Miss. LEXIS 176 (Miss. 1896).

Doctrine of lis pendens does not apply so far as to defeat title acquired under the statute of limitations. *Nelson v. Ratliff*, 72 Miss. 656, 18 So. 487, 1895 Miss. LEXIS 69 (Miss. 1895).

2. Notice in general.

In an action alleging breach of contract, breach of fiduciary duty, unjust enrichment, tortious breach of contract, and requesting imposition of a constructive trust and equitable lien upon property owned by the defendants, the court removed a lis pendens, but allowed the plaintiffs' claims to proceed to trial, since (1) the currently existing status quo caused the defendants irreparable injury and threatened them with the necessity of

filing for bankruptcy, and (2) removing the lis pendens would cause little injury to the plaintiffs and would not disserve the public interest. *Marett v. Scott*, 2000 U.S. Dist. LEXIS 5356 (N.D. Miss. Apr. 7, 2000).

The filing of a notice of lis pendens in an action before the recordation of a prior deed is effective to make a judgment recovered against the grantor after such recordation a lien on the property conveyed. *Jones v. Jones*, 249 Miss. 322, 161 So. 2d 640, 1964 Miss. LEXIS 393 (Miss. 1964).

Filing of lis pendens notice giving names of parties to suit and description of land, with statement that by suit it is sought to fix and enforce lien against land in order to effect sale thereof and application of proceeds of sale to payment of complainant's claim, is insufficient to create lien on land. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

Lis pendens notice is not a restraining process and damages are not allowable on affirmance of decree dismissing complaint for specific performance, with direction to note disposition in lis pendens record. *Bancroft v. Martin*, 144 Miss. 384, 109 So. 859, 1926 Miss. LEXIS 367 (Miss. 1926).

Where lis pendens notice is filed, judgment obtained thereafter in the suit takes effect as of the date of filing notice. *Bank of Tupelo v. Motley*, 127 Miss. 674, 90 So. 438, 1921 Miss. LEXIS 269 (Miss. 1921).

Where bill alleged that defendant vendor owned land or an interest therein, and that defendant buyer had property belonging to vendor, dismissal of bill as to defendant buyer left it still pending as to the other defendant, and lis pendens notice on land sold should not be cancelled. *Slattery v. P. L. Renoudet Lumber Co.*, 120 Miss. 621, 82 So. 332, 1919 Miss. LEXIS 114 (Miss. 1919).

3. —Description of realty.

Where lis pendens notice misdescribes the land, there is not constructive notice. *McDaniel v. Latham*, 143 Miss. 672, 109 So. 671, 1926 Miss. LEXIS 307 (Miss. 1926).

4. Encumbrancers and purchasers pending suit.

Wife's right to alimony constitutes such

an interest in her husband's real estate as that she may take advantage of the lis pendens statute to protect such interest as a vested right to maintenance therefrom. *Felder v. Felder's Estate*, 195 Miss. 326, 13 So. 2d 823, 1943 Miss. LEXIS 127 (Miss. 1943).

Assignee of mortgagee held entitled to priority over judgment lien of materialman filing petition against mortgagor to enforce lien against house prior to execution of trust deed, where materialman failed to file lis pendens notice and there was no written contract on file, in absence of knowledge by mortgagee of proceedings. *Swift & Co. v. Everett*, 171 Miss. 410, 157 So. 476, 1934 Miss. LEXIS 241 (Miss. 1934).

Where wife obtains a decree for alimony, declared a lien on land, she acquires a lien superior to a deed of trust executed by the husband alone after filing of lis pendens notice. *W. H. Gallaspy Sons Co. v. Massey*, 99 Miss. 208, 54 So. 805, 1911 Miss. LEXIS 191 (Miss. 1911).

Lis pendens notice must be given in mechanic's lien proceedings against realty to affect bona fide purchasers without notice. *McKenzie v. Fellows*, 97 Miss. 31, 52 So. 628, 1910 Miss. LEXIS 253 (Miss. 1910).

5. Rights and liabilities of purchasers pending suit.

When a construction money lender foreclosed its deed of trust on a shopping center and purchased the property at the trustee's sale, it took title pendente lite, subject to the contingency that laborers' and materialmen's liens were valid, where the laborers and materialmen had filed their claims more than six months before the trustee's sale was advertised, and where the materialmen and laborers brought suit to enforce their liens one day before the sale and filed notice of the suit on the lis pendens record; as between the lender and the landowners, who filed suit to enforce their liens and filed a lis pendens notice two days before the trustee's sale, the lender took title subject to the outcome of the landowners' suit and could not defeat their claim by foreclosing its deed of trust. *Guaranty Mortg. Co. v. Seitz*, 367 So. 2d 438, 1979 Miss. LEXIS 2202 (Miss. 1979).

Where lis pendens notice is filed, purchaser of the land takes it subject only to the right of plaintiff to have it sold pursuant to judgment. *Glattli v. Bradford*, 105 Miss. 573, 62 So. 643, 1913 Miss. LEXIS 236 (Miss. 1913).

Bona fide purchaser from a non-resident defendant without actual notice of suit, before completion of publication and mailing of process, will be protected in his title, though lis pendens notice was filed. *Fernwood Lumber Co. v. Meehan-Rounds Lumber Co.*, 85 Miss. 54, 37 So. 502, 1904 Miss. LEXIS 134 (Miss. 1904).

In a suit to enforce a lien upon machinery, the lien was effectual from the time of bringing suit, and dismissal on demurrer did not affect it prior to taking appeal, and one who purchased the property under a deed of trust given by defendant, between the time of the dismissal and plaintiff's appeal was a purchaser pendente lite and purchased subject to the lien. *Smith & Vaile Co. v. Burns*, 72 Miss. 966, 18 So. 483, 1895 Miss. LEXIS 67 (Miss. 1895).

RESEARCH REFERENCES

ALR.

Claim barred by limitation as subject to setoff, counterclaim, recoupment, cross bill, or cross action. 1 A.L.R.2d 630.

Propriety of filing of lis pendens in action affecting leasehold interest. 67 A.L.R.3d 747.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay. 49 A.L.R.4th 242.

Lis pendens as applicable to suit for separation or dissolution of marriage. 65 A.L.R.4th 522.

Am. Jur.

51 Am. Jur. 2d (Rev), Lis Pendens §§ 1-10, 20, 46-50.

Notice of lis pendens, 17 Am. Jur. Pl & Pr Forms (Rev), Lis Pendens, Forms 3-7.

18 Am. Jur. Pl & Pr Forms (Rev), Mortgages, Form 152.1 (Notice – Lis Pendens – Foreclosure).

CJS.

54 C.J.S., Lis Pendens §§ 2-11.

§ 11-47-5. Notice by officer levying on real estate.

When the sheriff, United States marshal, or other officer, shall levy upon real estate by virtue of any process, unless it be in execution upon a judgment which is duly enrolled in the county where the real estate is situated, he shall file with the clerk of the chancery court of each county in which the real estate, or any part thereof, is situated, a notice of the levy, containing the names of the parties to the proceedings, the kind of process, and a description of the real estate levied on. The clerk shall file, record and note upon the notice and record, as required in Section 11-47-3.

HISTORY: Codes, 1892, § 2784; 1906, § 3149; Hemingway's 1917, § 2500; 1930, § 2326; 1942, § 756.

Cross References — Liability of officer for failing to file notice, see § 11-47-13. Writs of execution or attachment on land, see § 13-3-123.

JUDICIAL DECISIONS

1. In general.

In attachment suit in chancery against land of nonresident, no lien is created

until mandatory provisions of Code 1942, §§ 1904, 2731, and this section [Code 1942, § 756] are complied with by issu-

ance and levy of writ of attachment and filing of notice of levy, and mere filing of lis pendens notice is insufficient to create lien. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

In attachment suit in chancery against nonresident, alleged to own land in this state, for damages arising out of breach of warranty in sale of automobile, person

claiming that lis pendens notice filed in suit creates cloud upon his superior interest in the land may become party to suit on motion for purpose of protecting his interest and by his appearance in suit intervenor does not waive necessity of issuance and levy of writ of attachment. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311, 1949 Miss. LEXIS 461 (Miss. 1949).

§ 11-47-7. Clerk to index the record.

The clerk, upon filing and recording each notice, shall index the same, both directly and indirectly, under the name of each party, each plaintiff or complainant, against each defendant, and each defendant at the suit of each plaintiff or complainant.

HISTORY: Codes, 1892, § 2785; 1906, § 3150; Hemingway's 1917, § 2501; 1930, § 2327; 1942, § 757.

Cross References — Indexing of instruments generally, see §§ 89-5-25, 89-5-33, 89-5-35.

JUDICIAL DECISIONS

1. In general.

A lien on property is not obtained by the mere filing of a lis pendens notice. The legal function of lis pendens is to give notice to the world of an alleged claim or lien in the property; the notice itself does not constitute an independent basis for imposition of a lien. *Aldridge v. Aldridge*, 527 So. 2d 96, 1988 Miss. LEXIS 263 (Miss. 1988).

The purchasers of property were unaffected by any lien to which the property may have been subject, even though a lis pendens notice was filed prior to purchase of the property, where the Chancery Clerk failed to immediately record notice of the lis pendens. *Aldridge v. Aldridge*, 527 So. 2d 96, 1988 Miss. LEXIS 263 (Miss. 1988).

§ 11-47-9. Effect of failure to enter notice.

If a person beginning any such suit, by declaration, bill, or cross-complaint affecting real estate, or if an officer levying any process upon real estate, shall fail to have the required notice entered in the lis pendens record, such suit or levy shall not affect the rights of bona fide purchasers or incumbrancers of such real estate, unless they have actual notice of the suit or levy.

HISTORY: Codes, 1892, § 2786; 1906, § 3151; Hemingway's 1917, § 2502; 1930, § 2328; 1942, § 758.

JUDICIAL DECISIONS

1. In general.

The purchasers of property were unaf-

ected by any lien to which the property may have been subject, even though a lis

pendens notice was filed prior to purchase of the property, where the Chancery Clerk failed to immediately record notice of the lis pendens. *Aldridge v. Aldridge*, 527 So. 2d 96, 1988 Miss. LEXIS 263 (Miss. 1988).

Although the better practice is to join both co-beneficiaries of a deed of trust as parties defendant in an action involving their interests, it is not reversible error to join only one beneficiary when both have actual notice of the pending suit. *Owens v. State*, 192 So. 2d 258, 1966 Miss. LEXIS 1235 (Miss. 1966).

The bona fide purchasers protected by this section [Code 1942, § 758] are those who become such after the beginning of

the suit or service of the writ. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633, 1948 Miss. LEXIS 247 (Miss. 1948).

Where lis pendens notice misdescribes the land, there is not constructive notice. *McDaniel v. Latham*, 143 Miss. 672, 109 So. 671, 1926 Miss. LEXIS 307 (Miss. 1926).

Lis pendens notice must be given in mechanic's lien proceedings against realty to affect bona fide purchasers without notice. *McKenzie v. Fellows*, 97 Miss. 31, 52 So. 628, 1910 Miss. LEXIS 253 (Miss. 1910).

RESEARCH REFERENCES

ALR.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay. 49 A.L.R.4th 242.

Am. Jur.

51 Am. Jur. 2d(Rev), Lis Pendens § 49-50.

CJS.

54 C.J.S., Lis Pendens § 18.

§ 11-47-11. Result of proceeding entered.

Where the proceedings in or as to the suit or levy, notice of which has been entered in the lis pendens record, shall be terminated, whether on the merits or not, the court wherein the same were pending shall direct the clerk who has the record to make such entry therein as it shall prescribe, to give notice of the result of the proceedings and of the devolution of the real estate; and the clerk shall at once, on presentation thereof, file and record the prescribed entry and note the date of filing and recording on the record.

HISTORY: Codes, 1892, § 2787; 1906, § 3152; Hemingway's 1917, § 2503; 1930, § 2329; 1942, § 759.

§ 11-47-13. Liability of a clerk, sheriff, or other officer.

If any clerk fail to perform any of the duties herein required of him, he shall be liable on his official bond to any party injured for all damages he may have sustained. If any sheriff, marshal, or other officer, fail to file the notice provided for in this chapter, upon the levy by him of any process on real estate, he shall be liable on his bond for all damages resulting therefrom.

HISTORY: Codes, 1892, § 2788; 1906, § 3153; Hemingway's 1917, § 2504; 1930, § 2330; 1942, § 760.

Cross References — Notice by officer levying on real estate, see § 11-47-5.

§ 11-47-15. Form of the docket.

The lis pendens docket shall be ruled, and have printed at the top of the pages, or opposite page, the following headings for the columns, and the entries shall correspond with them, viz.: Names of plaintiffs; names of defendants; kind of suit or writ; when suit instituted or writ levied; in, or from what court; nature of the suit or writ; description of the land involved or levied on; date of filing and recording lis pendens notice; result of the suit or levy; and remarks.

HISTORY: Codes, 1892, § 2789; 1906, § 3154; Hemingway's 1917, § 2505; 1930, § 2331; 1942, § 761.

CHAPTER 49.

RIGHTS AND DUTIES OF ATTORNEYS, GENERALLY

Sec.

- 11-49-1. Attorney to state residence of plaintiff.
- 11-49-3. Proceedings for money collected.
- 11-49-5. Attorney not to have pay as a witness.
- 11-49-7. Right to inspect papers.
- 11-49-9. Limitation of number to argue cause.
- 11-49-11. Notice to attorney as effectual as if to his client.

§ 11-49-1. Attorney to state residence of plaintiff.

Any attorney whose name is subscribed to or indorsed on any declaration or bill or petition in chancery, shall, on demand in writing, made by or on behalf of the defendant, declare forthwith, in writing, whether the suit has been brought by him, or with his authority or privity, and also the place of abode of the plaintiff; and if such attorney shall state that the suit was not brought by him, or with his authority or privity, or shall refuse to declare the place of abode of the plaintiff, then no further proceedings shall be taken in the action without leave of the court.

HISTORY: Codes, 1880, § 1545; 1892, § 217; 1906, § 224; Hemingway's 1917, § 201; 1930, § 3704; 1942, § 8676.

Cross References — General rules of pleading, practice, and procedure in county courts, see § 11-9-1.

Procedures to discipline attorneys and to determine capacity to practice law, see §§ 73-3-301 et seq.

Rules governing the professional conduct of attorneys, see Miss. Rules of Professional Conduct 1.1 et seq.

§ 11-49-3. Proceedings for money collected.

Every attorney or counselor at law receiving money for his client, and failing or refusing to pay the same when demanded, may be proceeded against in a summary way, by motion before the circuit court of the county where such attorney or counselor usually resides, or where he may be found, or before the court in which the money was collected, in the same manner that sheriffs are liable to be proceeded against for money collected on execution, five days' notice of such motion being given. In addition to the principal and legal interest, damages at ten per centum on the amount thereof shall be awarded. In case the failure to pay over said money shall appear to have been wilful and without reasonable excuse, the court shall fine and imprison such attorney or counselor as for a contempt and strike his name from the roll and revoke his license, or may suspend his right to practice until the money shall be paid over.

HISTORY: Codes, Hutchinson's 1848, ch. 26, art. 3 (9), art. 11; 1857, ch. 9, art. 10; 1871, § 2253; 1880, § 2405; 1892, § 218; 1906, § 225; Hemingway's 1917, § 202; 1930, § 3705; 1942, § 8677.

Cross References — Power of circuit court to hear and determine all motions against attorneys for money collected or received and not paid over on demand to party entitled thereto, see § 9-7-89.

Giving of notice in cases where motions are made against officers for neglect of official duties, see § 13-3-85.

Liability of sheriff for failing to pay over money collected on execution or attachment, see § 19-25-45.

JUDICIAL DECISIONS

1. In general.

Summary remedy by motion against an attorney, authorized by this section [Code 1942, § 8677], can only be maintained by the client. *Sloan v. Johnson*, 14 Miss. (6 S. & M.) 47 (1850); *McCreary v. Hoopes*, 25 Miss. 428, 1853 Miss. LEXIS 9 (Miss. 1853); *Brown v. Pool*, 127 Miss. 488, 90 So. 179, 1921 Miss. LEXIS 248 (Miss. 1921).

Pleading of client which, while bearing many of the earmarks of a declaration, was found to be a substantial compliance with this section [Code 1942, § 8677], as a summary motion against attorney to pay over money collected for his client, was held to require an answer. *Spivey v. Rodgers*, 114 Miss. 639, 75 So. 444, 1917 Miss. LEXIS 73 (Miss. 1917).

An attorney at law is liable for any breach of duty under his contract of employment; such liability attaches immediately upon the breach, and the statute of limitation begins to run from that time. *Hudson v. Kimbrough*, 74 Miss. 341, 20 So. 885, 1896 Miss. LEXIS 131 (Miss. 1896).

A decision in an attorney's favor because the motion was an improper remedy, does not bar a suit against him on the same case. *Coopwood v. Baldwin*, 25 Miss. 129, 1852 Miss. LEXIS 159 (Miss. 1852).

It is no defense to the motion that the attorney has been notified by others, claiming the fund, not to pay; and the attorney's right of set-off is good only to the extent of his lien for his fees in that particular case. *Dunn v. Vannerson*, 8 Miss. 579, 1843 Miss. LEXIS 125 (Miss. 1843).

Notice must be given the attorney. *Ex parte Heyfron*, 8 Miss. 127, 1843 Miss. LEXIS 65 (Miss. 1843).

The statute gives the remedy, by motion, only where the attorney fails or refuses to pay over money actually collected. The statute must be strictly construed. *Lombard v. Whiting & Lewis*, 1 Miss. 229, 1826 Miss. LEXIS 6 (Miss. 1826); *Banks v. Cage*, 2 Miss. 293, 1836 Miss. LEXIS 9 (Miss. 1836); *Sloan v. Johnson*, 14 Miss. (6 S. & M.) 47 (1850).

RESEARCH REFERENCES

ALR.

Power of court to order restitution to wronged client in disciplinary proceeding against attorney. 75 A.L.R.3d 307.

Am. Jur.

7 Am. Jur. 2d, Attorneys at Law §§ 188-191.

Complaint, petition, or declaration-For conversion of funds belonging to client-Money collected by attorney, 2 Am. Jur. Pl & Pr Forms (Rev), Attorneys at Law, Form 271.

CJS.

7 C.J.S., Attorney and Client § 313.

§ 11-49-5. Attorney not to have pay as a witness.

An attorney or counselor at law shall not be allowed any compensation as a witness in any cause in which he shall be concerned as attorney or counsel.

HISTORY: Codes, Hutchinson's 1848, ch. 26, art. 3 (15); 1857, ch. 9, art. 9; 1871,

§ 2252; 1880, § 2406; 1892, § 219; 1906, § 226; Hemingway's 1917, § 203; 1930, § 3706; 1942, § 8678.

Cross References — Amount of witness fees generally, see § 25-7-47.

RESEARCH REFERENCES

Am. Jur.

81 Am. Jur. 2d (Rev), Witnesses § 68,
70.

CJS.

98 C.J.S., Witnesses § 117, 118, 138,
194.

§ 11-49-7. Right to inspect papers.

Every attorney or counselor at law, practicing in any court in this state, shall be allowed, at all reasonable times, to inspect the papers and records relating to any suit in such court in which he may be concerned as attorney or counsel, without being compelled to take copies thereof. A clerk of any court may permit an attorney to take out of the office the papers in which he is interested, under such regulations as the court or the law may prescribe.

HISTORY: Codes, Hutchinson's 1848, ch. 26, art. 3 (16); 1857, ch. 9, art. 8; 1871, § 2251; 1880, § 2407; 1892, § 220; 1906, § 227; Hemingway's 1917, § 204; 1930, § 3707; 1942, § 8679.

Cross References — Withdrawal of exhibits, maps, or other items of evidence belonging to party or witness before expiration of appeal period or determination of suit, see § 9-13-29.

Court order making available to opposite party copies of books, papers and other documents relating to merits of action or proceeding or of defense thereto, see § 11-1-51.

Furnishing of copy of indictment and list of special venire to persons indicted for capital crimes, see § 99-15-27.

RESEARCH REFERENCES

ALR.

Applicability of attorney-client privilege to communications relating to drafting of documents. 55 A.L.R.3d 1322.

Am. Jur.

41 Am. Jur. Trials 683, Computer Research for the Trial Lawyer.

§ 11-49-9. Limitation of number to argue cause.

A court shall not permit more than two attorneys to argue on one side, unless good cause be shown therefor.

HISTORY: Codes, Hutchinson's 1848, ch. 26, art. 3 (11); 1857, ch. 9, art. 11; 1871, § 2254; 1880, § 2408; 1892, § 221; 1906, § 228; Hemingway's 1917, § 205; 1930, § 3708; 1942, § 8680.

Cross References — Limitation on number of counsel to be heard in criminal cases, see § 99-17-11.

Oral arguments in supreme court, see Miss. R. App. P. 34.

RESEARCH REFERENCES

ALR.

Prejudicial effect, of trial court's denial, or equivalent, of counsel's right to argue case. 38 A.L.R.2d 1396.

CJS.

88 C.J.S., Trial § 255.

Am. Jur.

75 Am. Jur. 2d (Rev), Trial § 104.

§ 11-49-11. Notice to attorney as effectual as if to his client.

Any notice required in the progress of a suit or action, in any court of this state, shall be as valid and effectual when served on the attorney or solicitor of the party in that cause as if served on the party himself.

HISTORY: Codes 1871, § 2255; 1880, § 2409; 1892, § 222; 1906, § 229; Hemingway's 1917, § 206; 1930, § 3709; 1942, § 8681.

Cross References — Service of notices in legal proceedings, see § 13-3-83.

JUDICIAL DECISIONS

1. In general.

A three-day notice to counsel of a motion to correct the record of an appealed conviction is an adequate compliance with due process. *Polk v. State*, 247 Miss. 734, 156 So. 2d 592, 1963 Miss. LEXIS 351 (Miss. 1963).

This section [Code 1942, § 8681] has reference to notice to an attorney during the progress of a trial until that particular litigation has been tried and judgment or decree rendered which is final until further order of the court upon proper service of process upon the litigant who is to be affected by such subsequent litigation. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

A letter, relied on as process in husband's action for modification of the provisions of a divorce decree, largely award-

ing custody of the children to the wife, served both upon the wife's attorney of record at the time of the former decree, and an attorney subsequently employed by the wife to negotiate with opposing counsel as to whether some different arrangement might be agreed upon as to the custody of the children, which did not advise wife's attorneys what modifications would be sought but merely notified that the husband would insist upon the wife obeying the terms of the former decree, did not constitute legal process upon the wife, who could not be found by the sheriff, so that a judgment awarding complete custody of the children to the father was void. *Logan v. Rankin*, 230 Miss. 749, 94 So. 2d 330, 1957 Miss. LEXIS 419 (Miss. 1957).

RESEARCH REFERENCES

Am. Jur.

7 Am. Jur. 2d (Rev), Attorneys at Law § 139.

2 Am. Jur. Pl & Pr Forms (Rev), Attorneys At Law, Forms 1 et seq.

CJS.

7 C.J.S., Attorney and Client §§ 286, 287.

APPEALS

CHAPTER 51.

APPEALS

Sec.

- 11-51-1. Repealed.
- 11-51-3. Appeals to Supreme Court.
- 11-51-5. Repealed.
- 11-51-7. Repealed.
- 11-51-9. Decrees in matters testamentary.
- 11-51-11. Appeal from judgment of criminal contempt.
- 11-51-12. Appeal from judgment of civil contempt.
- 11-51-13 and 11-51-15. Repealed.
- 11-51-17. One of several parties may appeal; failure to join appeal.
- 11-51-19. Repealed.
- 11-51-21. Bond to be given by parties who join in the appeal.
- 11-51-23. Execution when suspended as to some parties.
- 11-51-25. Repealed.
- 11-51-27. Terms for granting appeal.
- 11-51-29. Prepayment of costs in civil cases on appeal.
- 11-51-31. Bond for supersedeas.
- 11-51-33. Parties and sureties on bonds examined on oath.
- 11-51-35. Repealed.
- 11-51-37. Judgment on bond to supersede writ of possession.
- 11-51-39. Requirements of supersedeas bond where judgment appealed from directs sale or delivery of possession of real estate.
- 11-51-41. Repealed.
- 11-51-43. Supersedeas in cases not provided for.
- 11-51-45. When bond made payable to state.
- 11-51-47. Supersedeas bond signed by one appellant sufficient.
- 11-51-49. Bonds by corporations.
- 11-51-51 through 11-51-55. Repealed.
- 11-51-57. Appellee, nonresident or residence unknown.
- 11-51-59. Execution stayed by bond.
- 11-51-61 and 11-51-63. Repealed.
- 11-51-65. Record on second appeal.
- 11-51-67. Repealed.
- 11-51-69. Prepayment for costs certified on transcript.
- 11-51-71. Statement on transcript of payment of fee therefor.
- 11-51-73. Provision as to sending up bond directory.
- 11-51-75. Appeal to circuit court from decision of a local governing authority.
- 11-51-77. Appeal from assessment of taxes — Attorney General, district attorney, county attorney may appeal.
- 11-51-79. Appeals from the county court.
- 11-51-81. Appeals to the county court.
- 11-51-83. Appeals from unlawful entry and detainer court.
- 11-51-85. Appeals from judgment of justice court judge in civil cases.
- 11-51-87. Copy of record to be transmitted.
- 11-51-89. Justice, mayor, or police justice to deliver papers to circuit clerk.
- 11-51-91. Trial of cases on appeal from justice of the peace.
- 11-51-93. Certiorari proceedings in circuit court.
- 11-51-95. Certiorari to all other inferior tribunals.
- 11-51-97. New appeal bond.
- 11-51-99. How executors, administrators, guardians, and conservators appeal.

Sec.

- 11-51-101. State, county, and municipality, and officials representing them, may appeal without bond; prepayment of costs in lower court; costs of record of trial court.
- 11-51-103. Written demand for appeal in certain cases.
- 11-51-105 through 11-51-109. Repealed.
- 11-51-111. Taking of appeal from courts of separate judicial districts in Harrison County.
- 11-51-113. Repealed.

§ 11-51-1. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2308; 1892, § 31; 1906, § 32; Hemingway's 1917, § 7; 1930, § 12; 1942, § 1146]

Editor's Notes — Former § 11-51-1 related to appeals to the supreme court; writs of error abolished.

§ 11-51-3. Appeals to Supreme Court.

An appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representatives of such parties; and in no case shall such appeal be held to vacate the judgment or decree.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 34; 1857, ch. 62, art. 103; 1871, § 410; 1880, § 2309; 1892, § 32; 1906, § 33; Hemingway's 1917, § 8; 1930, § 13; 1942, § 1147; Laws, 1991, ch. 573, § 79, eff from and after July 1, 1991.

Editor's Notes — This section is modified or supplanted by Rule 8, Mississippi Rules of Appellate Procedure, as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

Cross References — Appellate jurisdiction of the supreme court, see § 9-3-9.

Jurisdiction of supreme court to try issues of fact on appeal, see § 9-3-37.

Appeal from circuit court orders in arbitration proceedings based on controversies arising from construction contracts or related agreements, see § 11-15-141.

Right of appeal in suits to confirm state land patents, see § 11-17-11.

Right of appeal from county court, see § 11-51-79.

Right of appeal in classification of sixteenth section school lands, see § 29-3-37.

Right of appeal in school-reopening proceeding, see § 37-65-129.

Right of appeal under Animal and Poultry Byproducts Disposal Law, see §§ 41-51-27, 41-51-29.

Right of appeal under Urban Flood and Drainage Control Law, see § 51-35-313.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see § 99-39-1 et seq.

Rules of practice and procedure before appellate courts, see Miss. R. App. P. 1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Right to appeal.
3. —Effect of death of party.
4. —Estoppel.
5. Cross appeal.
6. Appeal bond.
7. Persons entitled to appeal.
8. Time for appeal.
9. Effect of appeal.
10. Decisions appealable in general.
11. —Omissions in record, effect of.
12. Finality of determination.
13. —Nature and character of final determination.
14. —Final judgments and decrees.
15. Matters presented for review.
16. Dismissal of appeal.
17. Statutory damages.
18. Limitations.

1. In general.

On appeal the failure of the appellee to file a brief is tantamount to a confession of error, and will be accepted as such, and the judgment of the court below will be reversed, since an answer to the appellant's brief cannot be made without the court doing that which the appellee should have done, that is brief the appellee's side of the case. *Charles F. Hayes & Associates, Inc. v. Blue*, 233 So. 2d 127, 1970 Miss. LEXIS 1652 (Miss. 1970).

Supersedeas in civil cases under this section [Code 1942, § 1147] is a matter of right only where there is a money decree or judgment, or where there is a decree or judgment for the recovery or against the retention of specific property, or where the sale of or delivery of possession of real estate is directed. *Walton v. Tupelo*, 241 Miss. 894, 133 So. 2d 531, 1961 Miss. LEXIS 418 (Miss. 1961).

Statutes allowing a "person" to appeal give the right to one directly interested although not a party; those allowing a "party" to appeal limit the right to the original parties. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844, 1959 Miss. LEXIS 484 (Miss. 1959).

Where a chancery court denies materialmen the right to intervene in a suit to

recover contract price for erection of storage bins, the supreme court will affirm the decree on the ground that it was impossible to grant effective relief, where the materialmen appealed from the decree without supersedeas and did not appeal from the final decree in the main suit and the owner paid a judgment to the beneficiaries under a decree in the main suit. *Orgill Bros. & Co. v. Roddy*, 227 Miss. 291, 86 So. 2d 37, 1956 Miss. LEXIS 687 (Miss. 1956).

Without a decree, no appeal will lie from chancery court to Supreme Court, and when there is no decree of any kind signed or filed in proper office, and no application for appeal, motion to dismiss appeal must be sustained although record discloses admission by parties that interlocutory decree had been entered by chancery court. *In re Graham's Estate*, 208 Miss. 857, 45 So. 2d 726, 1950 Miss. LEXIS 305 (Miss. 1950).

In suit to quiet title, decree of chancellor that covenant in deed prohibiting use of property for any type of textile industry did not prohibit use of described property as place to manufacture garments or other similar articles of wearing apparel, given on conflicting evidence equally balanced, or nearly so, will be affirmed on appeal to Supreme Court. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6, 1949 Miss. LEXIS 302 (Miss. 1949).

Although statute (Laws, 1944, ch 208, Code 1942 §§ 3825-01 et seq.), creating civil service commissions in certain municipalities, provides for appeal only to circuit court by discharged employees, appeal from circuit court to Supreme Court is authorized by this section [Code 1942, § 1147]. *McLain v. State*, 198 Miss. 831, 24 So. 2d 15, 1945 Miss. LEXIS 256 (Miss. 1945).

An appeal is not a matter of right. *Jones v. Cashin*, 133 Miss. 585, 98 So. 98, 1923 Miss. LEXIS 170 (Miss. 1923). but see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

This section [Code 1942, § 1147] does not apply to appeals from justices of the

peace. It applies only to appeals from circuit and chancery courts. *Neblett v. State*, 75 Miss. 105, 21 So. 799, 1897 Miss. LEXIS 100 (Miss. 1897).

2. Right to appeal.

An indigent civil litigant may not appeal to the Supreme Court and proceed in forma pauperis. *Nelson v. Bank of Mississippi*, 498 So. 2d 365, 1986 Miss. LEXIS 2754 (Miss. 1986).

Where there is no order of the Chancery Court allowing an interlocutory appeal the Supreme Court has no jurisdiction to entertain an appeal until a final decree has been entered with reference to the release or discharge of a petitioner who intervened in the action. *Hendrick v. Bridges*, 211 So. 2d 544, 1968 Miss. LEXIS 1272 (Miss. 1968).

Where all orders prior to the final order with reference to the custody of children were consented to by the parties to a divorce action, neither of the parties could appeal from the orders to which they had consented. *Anderson v. Watkins*, 208 So. 2d 573, 1968 Miss. LEXIS 1412 (Miss. 1968).

An appeal cannot be taken from a consent decree or judgment of a trial court by one of the parties to the consent decree or judgment. *Potts v. Bryant*, 194 So. 2d 495, 1967 Miss. LEXIS 1412 (Miss. 1967).

Appeals are not a matter of right except as given by statute. *State ex rel. Patterson v. Autry*, 236 Miss. 316, 110 So. 2d 377 (1959), overruled on other grounds, *Brown v. Water Valley*, 319 So. 2d 649 (Miss. 1975), and see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Husband had the right to appeal from a final decree directing him to make payments to his divorced wife in specified amounts as permanent alimony and for support of the parties' minor child, and his failure to pay in full the monthly installments of alimony order to be paid, and which had matured while the appeal was pending, did not warrant a dismissal of the appeal. *Lowry v. Lowry*, 229 Miss. 376, 90 So. 2d 852, 1956 Miss. LEXIS 617 (Miss. 1956).

Right of appeal from final decree is absolute, and no court order is necessary for that purpose. *Thompson v. Wilson*, 172 Miss. 766, 160 So. 388, 161 So. 153, 1935 Miss. LEXIS 146 (Miss. 1935).

It is unnecessary with respect to the right of appeal to except to the final judgment. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780, 1915 Miss. LEXIS 194 (Miss. 1915).

The trial court was without power to limit the right of appeal to a period of time less than that prescribed by statute. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780, 1915 Miss. LEXIS 194 (Miss. 1915).

If decree appealed from is final and not interlocutory, leave to appeal is unnecessary. *Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152, 1914 Miss. LEXIS 255 (Miss. 1914).

3. —Effect of death of party.

In suit by State for use of another, death of use plaintiff after final judgment, but before appeal was taken, held not to abate right of appeal. *State use of Russell v. McRae*, 169 Miss. 169, 152 So. 826, 1934 Miss. LEXIS 26 (Miss. 1934).

4. —Estoppel.

Defendant may pay monetary judgment and afterwards appeal. *Currie v. Bennett*, 111 Miss. 228, 71 So. 324, 1916 Miss. LEXIS 274 (Miss. 1916).

Where a creditor of a decedent's estate was a party to a suit by which the title to land was adjudged to have been in the decedent at the time of her death and to the decree which ordered a sale thereof to pay debts, he was estopped to appeal therefrom after sale made, and, with his consent, confirmed, and he had received payment of the debt due him. *Parsons v. Rutherford*, 84 Miss. 70, 36 So. 187, 1904 Miss. LEXIS 15 (Miss. 1904).

5. Cross appeal.

No cross-appeal lies from judgment by which appellee obtains in trial court amount demanded by his declaration. *Forrest County v. Thompson*, 204 Miss. 628, 37 So. 2d 787, 1948 Miss. LEXIS 395 (Miss. 1948).

Attorney for party has right to take cross-appeal as to amount allowed for at-

torney's fees, he having filed in case proper assignment by party covering his fees. *Walsh Const. Co. v. Davis*, 204 Miss. 509, 37 So. 2d 757, 1948 Miss. LEXIS 385 (Miss. 1948).

Cross appeal may be taken by execution of bond therefor under the statute regulating appeals; but bond does not have to be given where the necessary record was brought to the Supreme Court by direct appeal. *Crawley v. Ivy*, 149 Miss. 764, 116 So. 90, 1928 Miss. LEXIS 88 (Miss. 1928).

No cross-appeal is necessary to obtain judgment in Supreme Court for fees fixed by statute when amount approved by Supreme Court is less than amount awarded appellee in trial court. *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801, 1923 Miss. LEXIS 153 (Miss. 1923).

In absence of cross-appeal and appellee's declaration failing to demand full amount sheriff could have successfully sued for as fees for serving overseers' commissions, Supreme Court cannot increase judgment, but will affirm judgment recovered. *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801, 1923 Miss. LEXIS 153 (Miss. 1923).

One not defendant to motion against sheriff for failure to return execution cannot cross appeal to review questions arising on original judgment. *Union Motor Car Co. v. Cartledge*, 133 Miss. 318, 97 So. 801, 1923 Miss. LEXIS 153 (Miss. 1923).

6. Appeal bond.

On policeman's appeal from affirmance by circuit court of order of municipal civil service commission approving policeman's discharge, the obligee on the appeal bond should have been the municipality instead of the civil service commission. *McLain v. State*, 198 Miss. 831, 24 So. 2d 15, 1945 Miss. LEXIS 256 (Miss. 1945).

Defect in policeman's appeal bond, on appeal to the Supreme Court from affirmance by circuit court of order of municipal civil service commission approving policeman's discharge, in naming the civil service commission as the obligee rather than the city, was cured by Code 1942, § 1673, which provides that a bond executed in a legal proceeding shall inure to the person to whom it is designed by law as security irrespective of to whom it is

made payable. *McLain v. State*, 198 Miss. 831, 24 So. 2d 15, 1945 Miss. LEXIS 256 (Miss. 1945).

An appeal bond not stricken and the appeal dismissed because names of some of principals inserted without authority. *Avent v. Markette*, 109 Miss. 835, 69 So. 705, 1915 Miss. LEXIS 231 (Miss. 1915).

Where on motion to dismiss appeal counsel admitted defect in appeal bond that it was signed only by one surety and requested leave to file a new bond, such request will be granted. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780, 1915 Miss. LEXIS 194 (Miss. 1915).

7. Persons entitled to appeal.

Wife's motion to dismiss a daughter as an appellant from an appeal was granted because the daughter was never a party to the matter at the trial level and only purportedly became a party once the matter was appealed. *Chester v. Labasse* (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70, 2018 Miss. LEXIS 192 (Miss. 2018).

Because the decedent's adult children did not appeal the chancellor's decision to void the warranty deeds conveying the subject property from the decedent to the decedent's children, they no longer possessed standing, pursuant to Miss. Code Ann. § 11-51-3 and Miss. R. App. P. 3, to appeal the chancellor's finding that the children's siblings obtained title to the property at issue by adverse possession. *Posey v. Pope*, 130 So. 3d 1183, 2014 Miss. App. LEXIS 40 (Miss. Ct. App. 2014).

Person seeking leave to gain amicus curiae status in Supreme Court should assert basis for request in petition and attach to petition proposed written brief in succinct and concise statement, but never to exceed page limitation allowed party to suit under Mississippi Supreme Court Rule 7; in addition, one seeking to become amicus must assert: (1) interest in some other pending case involving similar questions; (2) inadequacy of counsel for party or insufficiency brief; (3) facts, circumstances or laws in matters before court that may otherwise escape court's attention; or (4) substantial legitimate interest that will likely be affected by out-

come of case and which interest will not adequately be protected by those already parties to case. *Taylor v. Roberts*, 475 So. 2d 150, 1985 Miss. LEXIS 2208 (Miss. 1985).

Where the employer's petition for citation of contempt for violation of a temporary injunction charged that the labor union and its officials had failed and refused to direct the union members to cease participating in a work stoppage and to return to work, the charge was one of civil contempt and the employer was entitled to appeal from a decree of the chancery court which found the defendants were not guilty. *Masonite Corp. v. International Woodworkers of America*, 206 So. 2d 171, 1967 Miss. LEXIS 1242 (Miss. 1967).

An appeal may not be taken from the appointment of a guardian for an incompetent for the purpose of bringing a suit to set aside his conveyance, by the persons against whom such suit is to be brought. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844, 1959 Miss. LEXIS 484 (Miss. 1959).

Husband had the right to appeal from a final decree directing him to make payments to his divorced wife for permanent alimony and for support of the parties' minor child, and his failure to pay in full the monthly instalments of alimony ordered to be paid, and which had matured while the appeal was pending, did not warrant a dismissal of the appeal. *Lowry v. Lowry*, 229 Miss. 376, 90 So. 2d 852, 1956 Miss. LEXIS 617 (Miss. 1956).

Where a landlord brought an action against a tenant and others who were claiming to have an interest in lease for rent owing and possession of premises, and where a judgment was rendered against the tenant and others and their sureties, even though the tenant did not appeal the others in interest with the tenant and their sureties could prosecute an appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829, 1955 Miss. LEXIS 542 (Miss. 1955).

Attorney for party has right to take cross-appeal as to amount allowed for attorney's fees, he having filed in case proper assignment by party covering his fees. *Walsh Const. Co. v. Davis*, 204 Miss. 509, 37 So. 2d 757, 1948 Miss. LEXIS 385 (Miss. 1948).

Persons who are not parties to proceedings are not entitled to an appeal therefrom. *Hunter v. Stanford*, 198 Miss. 299, 22 So. 2d 166, 1945 Miss. LEXIS 196 (Miss. 1945).

Guardian cannot appeal from an order which he petitioned the court to make and which, therefore, was by his consent. *Hunter v. Stanford*, 198 Miss. 299, 22 So. 2d 166, 1945 Miss. LEXIS 196 (Miss. 1945).

Although nonresident defendants, against whom a decree pro confesso was taken upon their failure to answer by publication and summons, have right to apply to the court rendering the decree for a rehearing, they also have the right to treat the decree as final and to appeal therefrom in order to avoid danger that the property might be sold to a purchaser in good faith pursuant to the decree. *Henderson v. Odom*, 198 Miss. 208, 22 So. 2d 159, 1945 Miss. LEXIS 186 (Miss. 1945).

Where the judgment of the court complained of in a personal injury action was entered on the minutes of the court on September 8th, 1939, the court adjourned on September 22d, 1939, an appeal bond filed and approved on March 21, 1940, more than six months after the entry of judgment but less than six months after the adjournment of the court, was not filed within time, the six months' limitation on the time within which to appeal from the judgment beginning on the day after it was rendered. *Johnson v. Mississippi Power Co.*, 189 Miss. 67, 196 So. 642, 1940 Miss. LEXIS 111 (Miss. 1940).

A county having no right to institute a suit for mandamus in a manner affecting public interest had no such interest or right as would enable it to appeal from the order of the court below dismissing such proceeding. *Hancock County v. State Highway Com.*, 188 Miss. 158, 193 So. 808, 1940 Miss. LEXIS 15 (Miss. 1940).

Where tax collector brought suit against taxpayer for taxes owed to taxing districts, including county, and cause proceeded to final decree from which no appeal was taken by tax collector, county was not entitled to appeal as party to final decree. *Gulley v. Denkmann Lumber Co.*, 177 Miss. 164, 170 So. 151, 1936 Miss. LEXIS 235 (Miss. 1936).

Only those who are actually parties to the suit or who are privies or personal representatives may appeal. *Farmers & Merchants Bank v. Rushing*, 175 Miss. 826, 167 So. 784, 1936 Miss. LEXIS 71 (Miss. 1936).

In suit by superintendent of banks, in charge of liquidation of bank, for collection of debt allegedly due the bank, superintendent held entitled to appeal from adverse decree without bond. *Love v. Mississippi Cottonseed Products Co.*, 174 Miss. 697, 159 So. 96, 165 So. 446, 1935 Miss. LEXIS 28 (Miss. 1935).

An amicus curiae has no right to appeal from an adverse judgment. *Jones v. Cashin*, 133 Miss. 585, 98 So. 98, 1923 Miss. LEXIS 170 (Miss. 1923). but see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Attorney-general may appeal from a decree in suit to collect taxes and damages and sell property of the railroad therefor. *State ex rel. Roberson v. Columbus & G. R. Co.*, 129 Miss. 882, 93 So. 362, 1922 Miss. LEXIS 98 (Miss. 1922).

Assignee of a chose in action may appeal to the Supreme Court in assignor's name, from a judgment in an action begun and prosecuted in the court below in the assignor's name. *Ridgeway v. Jones*, 122 Miss. 624, 84 So. 692, 1920 Miss. LEXIS 463 (Miss. 1920).

Under Laws 1918 ch 238, the attorney-general may bring an appeal, though the judgments below were rendered prior to the passage of the statute. *Board of Sup'rs v. Guaranty Loan, Trust & Banking Co.*, 118 Miss. 600, 79 So. 802, 1918 Miss. LEXIS 102 (Miss. 1918).

Laws 1912 ch 196 and Laws 1914 ch 270 do not give a drainage district a right to appeal from an order of a chancellor directing payment of damages for land appropriated. *Bogue Hasty Drainage Dist. v. Napanee Plantation Co.*, 118 Miss. 493, 78 So. 709, 1918 Miss. LEXIS 40 (Miss. 1918).

Defendant may pay monetary judgment and afterwards appeal. *Currie v. Bennett*, 111 Miss. 228, 71 So. 324, 1916 Miss. LEXIS 274 (Miss. 1916).

When one or more of the parties aggrieved by the decree may appeal, stated. *Avent v. Markette*, 109 Miss. 835, 69 So. 705, 1915 Miss. LEXIS 231 (Miss. 1915).

County entitled to appeal from judgment of circuit court allowing a claim of \$40.00 against the county, the appeal being first from the Board of Supervisors. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007, 1906 Miss. LEXIS 153 (Miss. 1906).

Where judgment in suit by a creditor is rendered against one surety and in favor of another, the surety held liable may appeal and contest the rightfulness of his cosurety's discharge. *Ruff v. Montgomery*, 83 Miss. 185, 36 So. 67, 1903 Miss. LEXIS 31 (Miss. 1903).

Section 2 Act of 1894, amending § 2330 Code of 1892 (§ 2571 Code of 1906), does not prevent an appeal by an insurance company against which a judgment has been rendered. *Supreme Lodge, K. H. v. Fletcher*, 78 Miss. 377, 28 So. 872, 1900 Miss. LEXIS 113 (Miss. 1900), limited, *Nehi Bottling Co. v. Jefferson*, 226 Miss. 586, 84 So. 2d 684, 1956 Miss. LEXIS 435 (Miss. 1956).

8. Time for appeal.

Appeal [April 3, 1985] from March 4, 1985 order denying motion to reconsider November 21, 1984 order, which was filed on [April 3, 1985], was timely. *Belhaven Improv. Asso. v. Jackson*, 507 So. 2d 41, 1987 Miss. LEXIS 2428 (Miss. 1987).

In an action brought by a bank to foreclose its deed of trust executed by a corporation and secured by the personal guarantees of five of the corporation's stockholders, for an appeal under § 11-51-3 time runs from the entry of the decree ordering the sale rather than from the order confirming the sale, therefore, the appeal was untimely since it was not brought within statutory period. *First Mississippi Nat'l Bank v. S & K Enterprises, Inc.*, 460 So. 2d 839, 1984 Miss. LEXIS 2008 (Miss. 1984).

Appeal may be prosecuted from judgment or decree final in its nature, immediately after its rendition and before the end of the term of the court at which it is rendered. *Byrne, Vance & Co. v. Jeffries*, 38 Miss. 533, 1860 Miss. LEXIS 23 (Miss. 1860).

9. Effect of appeal.

Lower court without power to proceed further with trial until appeal is disposed of. *Jennings v. Shapira*, 131 Miss. 596, 95 So. 305, 1923 Miss. LEXIS 198 (Miss. 1923).

Supreme Court, after obtaining jurisdiction on appeal, will not allow any disposition of the cause by the nominal parties, where it is reasonably probable that the equitable interest of third persons will be prejudiced. *Sivley v. Sivley*, 96 Miss. 134, 50 So. 552, 1909 Miss. LEXIS 28 (Miss. 1909).

10. Decisions appealable in general.

Appeal may be taken from an order denying a motion to compel arbitration. *Tupelo Auto Sales, Ltd. v. Scott*, 844 So. 2d 1167, 2003 Miss. LEXIS 212 (Miss. 2003).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under § 99-35-103(b); there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. *Common Cause of Mississippi v. Smith*, 548 So. 2d 412, 1989 Miss. LEXIS 362 (Miss. 1989).

A judgment of nonsuit is a "final judgment" within the meaning of that term as contemplated by this section [Code 1942, § 1147], and is, therefore, a judgment from which an appeal can be prosecuted to the Supreme Court. *Hattiesburg Butane Gas Co. v. Griffin*, 206 So. 2d 845, 1968 Miss. LEXIS 1590 (Miss. 1968).

The plaintiff in a civil contempt proceeding has a right to appeal under this section [Code 1942, § 1147] which provides generally for appeals in civil cases. *Masonite Corp. v. International Woodworkers of America*, 206 So. 2d 171, 1967 Miss. LEXIS 1242 (Miss. 1967).

A decree entered by consent of the parties is not appealable. *Legg v. Legg*, 251 Miss. 12, 168 So. 2d 58, 1964 Miss. LEXIS 322 (Miss. 1964).

Since the enactment of L. of 1956, ch. 230 (Code 1942, § 1536), an appeal lies

from an order granting a new trial on the ground that the damages awarded are excessive. *Strickland v. Mississippi State Highway Com.*, 240 Miss. 7, 124 So. 2d 696, 1960 Miss. LEXIS 481 (Miss. 1960).

Order granting plaintiff's motion for nonsuit requested after defendant had moved for directed verdict and court had indicated an intention to grant defendant's motion but before the peremptory instruction was given, is not appealable. *Johns-Manville Products Corp. v. McClure*, 46 So. 2d 538 (Miss. 1950).

Order of dismissal as to resident defendant, by reason of which nonresident defendant was able to and did procure a removal to federal court, was appealable, since trial court was thereby prevented from proceeding to develop the entire case and to make a final decree as to all parties. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Order removing case to Federal court at request of nonresident defendant, did not deprive Supreme Court of jurisdiction to entertain an appeal from order of dismissal as to a resident defendant made prior to the removal order, as the rule applied that transfer of a suit from state to Federal court does not vacate what was done in the state court prior to removal. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Appeal may be taken from judgment on agreed state of facts without agreement as to judgment to be rendered. *Thompson v. Hill*, 152 Miss. 388, 118 So. 895, 1928 Miss. LEXIS 231 (Miss. 1928).

Supreme Court under no duty to consider appeal unless assignment of error and brief pointing out the matters relied upon are filed according to rules of the court. *Henson v. State*, 143 Miss. 199, 108 So. 719, 1926 Miss. LEXIS 255 (Miss. 1926).

Appeal lies from a judgment establishing lost record. *Johnson v. Richey Land Imprv. & Mfg. Co.*, 126 Miss. 240, 88 So. 634, 1921 Miss. LEXIS 30 (Miss. 1921).

A judgment rendered on peremptory instruction granted at the request of both parties pursuant to an agreement between them is a "judgment by confession,"

and not appealable. *Grand Lodge, C. K. P. v. Barlow*, 108 Miss. 663, 67 So. 152, 1914 Miss. LEXIS 256 (Miss. 1914).

An appeal will lie from a judgment rendered in the circuit court in a suit commenced therein though it does not exceed \$50.00. *Liles v. Cawthorn*, 78 Miss. 559, 29 So. 834, 1900 Miss. LEXIS 178 (Miss. 1900).

Where the jury find a defendant not guilty on the ground of insanity at the time and certify that he is still insane and dangerous, the verdict is not reviewable on appeal. *Caffey v. State*, 78 Miss. 645, 29 So. 396, 1900 Miss. LEXIS 146 (Miss. 1900).

When appeal is prosecuted from decision of the Board of Supervisors to the circuit court, and there decided, the party aggrieved may appeal to the Supreme Court; the statute is "from any final judgment," etc. *Crump v. Board of Supervisors*, 52 Miss. 107, 1876 Miss. LEXIS 174 (Miss. 1876).

11. —Omissions in record, effect of.

Appeal dismissed where the record contains no final judgment from which the appeal could have been prosecuted. *Nelson v. Henderson*, 16 So. 911 (Miss. 1895); *J. T. Gabbart & Co. v. Bauer*, 38 So. 548 (Miss. 1905); *Perkins v. Thompson*, 127 Miss. 864, 90 So. 710, 1921 Miss. LEXIS 289 (Miss. 1921).

Where transcript on appeal fails to show that final judgment was rendered by the circuit court the appeal will be dismissed. *Brown v. State*, 95 Miss. 670, 49 So. 146, 1909 Miss. LEXIS 260 (Miss. 1909).

12. Finality of determination.

Because a circuit court's ruling on an inmate's motion to show cause was a final judgment, the inmate's appeal from that final judgment was appealable to supreme court under its constitutional appellate jurisdiction and assignable by the supreme court to the court of appeals. *Pryer v. State*, 139 So. 3d 713, 2014 Miss. LEXIS 272 (Miss. 2014).

Orders denying and subsequently granting a motion to recuse the trial judge in a legal malpractice case were in no way final as to the issues in the case; as such,

the appellate court had no jurisdiction to review the orders under Miss. Code Ann. § 11-51-3. *Turner v. Everett*, 13 So. 3d 311, 2008 Miss. App. LEXIS 743 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 356 (Miss. 2009).

Pursuant to Miss. Code Ann. § 11-51-3, the appellate court had jurisdiction to hear the father's appeal of the denial of his motion for modification of custody as it was an appeal from a final order. *Quadrini v. Spradley*, 964 So. 2d 576, 2007 Miss. App. LEXIS 543 (Miss. Ct. App. 2007).

Dismissal of a motion to require that the executrix of an estate post bond was an interlocutory order, not a final decree, and was not appealable under this section. *In re Estate of Rosamond*, 326 So. 2d 465, 1976 Miss. LEXIS 1738 (Miss. 1976).

An order sustaining a demurrer of one of plaintiffs to cross-bill of one of defendants, although final as to the party involved, is not a final order within the meaning of § 11-51-3, since to be a final decree appealable under that section, decree must be final as to all parties and all issues. *American Empire Life Ins. Co. v. Skil-Craft Builders, Inc.*, 291 So. 2d 735, 1974 Miss. LEXIS 1744 (Miss. 1974).

Ordinarily rights and liabilities of several parties are so connected and interwoven that appeals by piecemeal should not be allowed; moreover, fragmented appeals result in needless delay and expense, and interfere with rights of other litigants to proceed with litigation. *American Empire Life Ins. Co. v. Skil-Craft Builders, Inc.*, 291 So. 2d 735, 1974 Miss. LEXIS 1744 (Miss. 1974).

A judgment is not final which settles a case as to a part only of the defendants, and an order dismissing the suit as to one of several defendants, all of whom are charged to be jointly and severally liable, is not a final judgment from which an appeal will lie, while the case remains undisposed of in the lower court as to the other defendants. *Eubanks v. Aero Mayflower Transit Co.*, 253 Miss. 159, 175 So. 2d 169, 1965 Miss. LEXIS 978 (Miss. 1965).

A decree confirming a sale on foreclosure is not a final decree and so not appealable under this section [Code 1942, § 1147]. *Worthy v. Graham*, 246 Miss.

358, 149 So. 2d 469, 1963 Miss. LEXIS 449 (Miss. 1963).

No appeal is allowable from circuit court judgment unless judgment is in all respects final, and order ruling on demurrer, which goes no further than to rule on demurrer, is no final judgment. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5, 1949 Miss. LEXIS 301 (Miss. 1949).

Appeals to Supreme Court from interlocutory orders or decrees apply only to cases in chancery courts. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5, 1949 Miss. LEXIS 301 (Miss. 1949).

No appeal is allowable from circuit court judgment unless judgment is in all respects a final judgment. *State ex rel. Rice v. Large*, 171 Miss. 330, 157 So. 694, 1934 Miss. LEXIS 253 (Miss. 1934).

13. —Nature and character of final determination.

State supreme court was without jurisdiction to entertain an appeal under Miss. Code Ann. § 11-51-3 because an order setting aside a prior order of reinstatement did not adjudicate the case on its merits, and left a pending motion to be dealt with by the assigned judge. *Lafontaine v. Holliday*, 110 So. 3d 785, 2013 Miss. LEXIS 146 (Miss. 2013).

It was not error for chancellor to amend oral pronouncement of alimony increase from \$500 per month to \$250 per month because oral pronouncement does not constitute final judgment. *Banks v. Banks*, 511 So. 2d 933, 1987 Miss. LEXIS 2694 (Miss. 1987).

To be a final decree appealable under § 11-51-3, the decree must be final as to all parties and all issues. *American Empire Life Ins. Co. v. Skil-Craft Builders, Inc.*, 291 So. 2d 735, 1974 Miss. LEXIS 1744 (Miss. 1974).

Although an appeal may be taken to the Supreme Court from any final judgment of the circuit court in a civil case under the provisions of Code 1942, § 1147, there is no interlocutory appeal from a judgment of the circuit court, except from an order for a new trial based on the excessiveness or inadequacy of damages; and a judgment of the circuit court is not final which

does not settle the cause as to all of the parties or does not finally dispose of all the issues presented. *State Tax Com. v. Clinton*, 267 So. 2d 312, 1972 Miss. LEXIS 1415 (Miss. 1972).

Where a decree set aside a prior decree admitting to probate in solemn form an alleged lost holographic will, but did not dismiss petition for probate of will, the decree was not a final decree from which an appeal could successfully be taken. *In re Hollensbee's Estate*, 218 Miss. 700, 67 So. 2d 275, 1953 Miss. LEXIS 590 (Miss. 1953).

Order of circuit court from which appeal was taken to effect that demurrer to petition was heard and considered and it is ordered that demurrer be sustained and, petitioners praying appeal to Supreme Court, it is ordered that same be granted, is not final judgment and not appealable. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5, 1949 Miss. LEXIS 301 (Miss. 1949).

While a judgment which adjudicates everything material to the determination of the cause, and which, when executed according to its terms, will give all the relief which could be afforded, is final, a necessary qualification of this rule is that, if a motion for the setting aside of a judgment is filed before the end of the term of the court at which it was rendered, the finality of the judgment is thereby suspended and the limitation on the time for an appeal begins when, but not until, the motion is disposed of. *Johnson v. Mississippi Power Co.*, 189 Miss. 67, 196 So. 642, 1940 Miss. LEXIS 111 (Miss. 1940).

Judgment lacks finality putting statute of limitations respecting appeals into operation until final disposition of seasonable motion for new trial or other proper motion challenging it. *Moore v. Montgomery Ward & Co.*, 171 Miss. 420, 156 So. 875, 1934 Miss. LEXIS 204 (Miss.), *aff'd*, *Moore v. Montgomery-Ward & Co.*, 158 So. 148 (Miss. 1934).

While motion for new trial is unnecessary to obtain review of judgment in Supreme Court, unless made on grounds which would set aside or modify judgment and could not otherwise be considered by trial judge, complaining party has right to make motion and judgment is not final as

respects appeal until trial court disposes of motion, if seasonably made. *Moore v. Montgomery Ward & Co.*, 171 Miss. 420, 156 So. 875, 1934 Miss. LEXIS 204 (Miss.), *aff'd*, *Moore v. Montgomery-Ward & Co.*, 158 So. 148 (Miss. 1934).

Judgment to be final must adjudicate merits of the controversy. *Bank of Courtland v. Long Creek Drainage Dist.*, 133 Miss. 531, 97 So. 881, 1923 Miss. LEXIS 161 (Miss. 1923); *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5, 1949 Miss. LEXIS 301 (Miss. 1949).

Decree adjudicating everything material, and which when executed, will give all the relief that could be afforded, is final. *Humphreys v. Stafford*, 71 Miss. 135, 13 So. 865, 1893 Miss. LEXIS 136 (Miss. 1893); *Johnson v. Mississippi Power Co.*, 189 Miss. 67, 196 So. 642, 1940 Miss. LEXIS 111 (Miss. 1940).

14. —Final judgments and decrees.

Because the chancellor retained jurisdiction to supervise the reunification process and to revisit the case in six months for further review, its order and opinion did not constitute a final, appealable judgment, and thus, the order was, not appropriate for consideration on direct appeal; the order left open for consideration in the chancery court the issues of custody and visitation. *Wigington v. McCalop*, 191 So. 3d 124, 2016 Miss. LEXIS 192 (Miss. 2016).

Chancellor's order that found father in contempt for failing to pay child support but did not determine the amount of the arrearage or the amount of future child support the father would be obligated to pay was not a final order and could not be considered on appeal. *Maurer v. Boyd*, 111 So. 3d 690, 2013 Miss. App. LEXIS 171 (Miss. Ct. App. 2013).

Although Mississippi appellate courts are generally without jurisdiction to hear direct appeals from temporary orders, the denial of a Miss. Code Ann. § 11-51-3 (Supp. 1993), the denial of a Miss. R. Civ. P. 60(b) motion is a final judgment that is reviewable. *Clark v. Clark*, 43 So. 3d 496, 2010 Miss. App. LEXIS 28 (Miss. Ct. App.), *cert. denied*, 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Where the trial court's order simply compelled arbitration, but did not dismiss

claims or end litigation on the merits, it had to be treated as interlocutory and not as final; thus, the Mississippi Supreme Court did not have jurisdiction to review it. *Banks v. City Fin. Co.*, 825 So. 2d 642, 2002 Miss. LEXIS 280 (Miss. 2002), *overruled in part*, *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 2010 Miss. LEXIS 16 (Miss. 2010).

There was no final judgment where the appellant sought review of an order of the county board of supervisors calling for a special election as an election had yet to be held and the board had declined to act unilaterally on the appellant's petition. *Miss. Waste of Hancock County, Inc. v. Bd. of Supervisors*, 818 So. 2d 326, 2001 Miss. LEXIS 43 (Miss. 2001).

This section [Code 1942, § 1147] does not authorize an appeal from an order or a judgment vacating a writ of garnishment and dismissing the suit as to a garnishee where the garnishment is issued as a part of an attachment writ in a suit which is still pending in the trial court at the time the appeal is allowed. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270, 1940 Miss. LEXIS 189 (Miss. 1940). But see *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), *cert. denied*, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

The Supreme Court was authorized to treat a circuit court's denial of a criminal defendant's motion to dismiss the indictment against him on double jeopardy grounds as a "final judgment" in a civil action under § 11-51-3, which authorizes an appeal from a final judgment, and § 9-3-9, which gives the Supreme Court jurisdiction of an appeal from any final judgment in the circuit court, since the double jeopardy claim went beyond the defendant's right not to be convicted in that it involved his constitutional right not to be prosecuted for the offense, and therefore denial of the claim was final and justified immediate determination. *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), *cert. denied*, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

A Chancery Court ruling entitled "Court Opinion," which stated that it was the

"final order," acted to finally terminate litigation in the trial court for purposes of appeal such that no further act by the court was necessary even though no separate "final judgment" was entered. Adoption of Karenina v. Presley, 526 So. 2d 518, 1988 Miss. LEXIS 244 (Miss. 1988).

Order overruling motion to reconsider is final judgment for purposes of appeal. Belhaven Improv. Asso. v. Jackson, 507 So. 2d 41, 1987 Miss. LEXIS 2428 (Miss. 1987).

Rule, that order dismissing cause of action as to all defendants served with process is final even though no order has been entered as to defendant who has not been served, has not been changed by adoption of Mississippi Rules of Civil Procedure. Stanley v. Allstate Ins. Co., 465 So. 2d 1023, 1985 Miss. LEXIS 1943 (Miss. 1985).

In a tort action based on an alleged defect in a bridge that was brought against a county board of supervisors and other named defendants, the trial court's order sustaining demurrers filed by each of the defendants, except one who was not served with process and who filed no pleadings, was a final appealable judgment as to all the parties legally before the lower court; the mere naming of a person in a declaration and the issuance of process without service thereof did not make the remaining named defendant a party to the action for purposes of the statute governing appeals from final judgments or decrees. State use of Moak v. Moore, 373 So. 2d 1011, 1979 Miss. LEXIS 2287 (Miss. 1979).

In an action on an open account in which the defendant's plea in bar was sustained by the county court and the case dismissed, the order of the circuit court reversing the county court, holding that the plea in bar was without merit and setting the case on its docket for trial was not a final judgment from which an appeal to the Supreme Court would lie. Southern Saw & Mower Distributors, Inc. v. Dolmar North American Corp., 317 So. 2d 400, 1975 Miss. LEXIS 1750 (Miss. 1975).

Order of the circuit court requiring the presence of the court reporter to transcribe the proceedings of the grand jury was a final order appealable by the state,

as all issues raised by the appellee's motion upon which the order was based were concluded and no further proceedings were to be had that could affect them. State v. Burrill, 312 So. 2d 1, 1975 Miss. LEXIS 1629 (Miss. 1975).

An order sustaining a demurrer is not final for purposes of appeal where leave to amend is granted, unless there is a formal judgment of dismissal by the trial judge on or after the expiration of the period to amend. Farned v. Aetna Casualty & Surety Co., 263 So. 2d 790, 1972 Miss. LEXIS 1350 (Miss. 1972).

Where the circuit court sustained an insurer's demurrer to the declaration of the insured seeking recovery under uninsured motorist coverage, and no leave to amend was granted, the judgment became final at the end of the court term and an appeal could lie therefrom. Farned v. Aetna Casualty & Surety Co., 263 So. 2d 790, 1972 Miss. LEXIS 1350 (Miss. 1972).

Order granting new trial in the circuit court is not a final order as required by this section [Code 1942, § 1147], and hence is not appealable. Street v. Lokey, 209 Miss. 412, 47 So. 2d 816, 1950 Miss. LEXIS 405 (Miss. 1950).

Order granting plaintiff's motion for nonsuit requested after defendant had moved for directed verdict and court had indicated an intention to grant defendant's motion but before the peremptory instruction was given, is not appealable. Johns-Manville Products Corp. v. McClure, 46 So. 2d 538 (Miss. 1950).

After motion for new trial is filed, judgment finally disposing of case, prior to which no appeal to Supreme Court will lie, is judgment overruling motion for new trial. Shaw v. Bula Cannon Shops, Inc., 205 Miss. 458, 38 So. 2d 916, 1949 Miss. LEXIS 443 (Miss. 1949).

Motion for new trial suspends final judgment as final judgment until motion is overruled, but it does not operate to revoke notice to court reporter to transcribe notes of evidence which was given according to law and at proper time, and motion to strike stenographer's transcript on ground notice was revoked should be overruled. Shaw v. Bula Cannon Shops, Inc., 205 Miss. 458, 38 So. 2d 916, 1949 Miss. LEXIS 443 (Miss. 1949).

Action by judge in vacation in denying writ of prohibition was not such a final order as may be appealable. *Holmes v. Board of Supervisors*, 199 Miss. 363, 24 So. 2d 867, 1946 Miss. LEXIS 204 (Miss. 1946).

When a decree dismisses a bill as to one party and it is not contemplated that any further proceedings are to be taken against him, it is final as to that party, although other parties remain against whom further proceedings are to be taken, but, generally, there must be a final decree as to all the parties before an appeal will lie, and the statute limiting the time for appeal does not begin to run until final judgment as to all parties. *Mid South Paving Co. v. State Highway Com.*, 197 Miss. 751, 21 So. 2d 646, 1945 Miss. LEXIS 309 (Miss. 1945).

Where permission granted to corporate receiver to file bill of complaint was revoked and bill of complaint was dismissed, dismissal of defendant's cross bill, though without prejudice, was a final decree within the meaning of this section [Code 1942, § 1147], and appealable. *Federal Credit Co. v. Newman*, 196 Miss. 463, 16 So. 2d 153, 1944 Miss. LEXIS 215 (Miss. 1944).

No final judgment valid in law was entered in the circuit court where the presiding judge failed to sign the minutes on or before the last day of the term and, accordingly, under this section [Code 1942, § 1147] the supreme court had no jurisdiction over an appeal therefrom except to determine upon the record before it that there was no final judgment, and to enter an order vacating the supposed judgment upon the record of the case. *Jackson v. Gordon*, 194 Miss. 268, 11 So. 2d 901, 1943 Miss. LEXIS 49 (Miss. 1943), but see, *De La Beckwith v. State*, 615 So. 2d 1134, 1992 Miss. LEXIS 807 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187, 1993 U.S. LEXIS 5961 (U.S. 1993).

Under statutes governing appeals, order sustaining demurrer to replication in part and overruling it in part was not "final," and hence not appealable. *Covington v. Ross*, 180 Miss. 789, 178 So. 474, 1938 Miss. LEXIS 35 (Miss. 1938).

Dismissal of a case without prejudice held "final judgment" within this section

[Code 1942, § 1147]. *Solomon v. Continental Baking Co.*, 174 Miss. 890, 165 So. 607, 166 So. 376, 1936 Miss. LEXIS 215 (Miss. 1936).

In quo warranto proceeding, order ruling on demurrer, and which went no further than simply to rule on demurrer, was not appealable "final judgment." *State ex rel. Rice v. Large*, 171 Miss. 330, 157 So. 694, 1934 Miss. LEXIS 253 (Miss. 1934).

Refusal to grant either writ of error coram nobis or supersedeas by judge in vacation held not "judgment" from which appeal lies. *Carraway v. State*, 163 Miss. 639, 141 So. 342, 1932 Miss. LEXIS 79 (Miss. 1932).

Decree ordering sale of land to pay debts was final decree as regards appeal, and precluded the necessity of compliance with the requirements of the statute relating to interlocutory decrees. *Blum v. Planters' Bank & Trust Co.*, 154 Miss. 800, 122 So. 784, 1929 Miss. LEXIS 177 (Miss. 1929).

Interlocutory decree in chancery court, sustaining demurrer to bill and transferring cause to circuit court was not appealable. *Warner v. Hogin*, 148 Miss. 562, 114 So. 347, 1927 Miss. LEXIS 39 (Miss. 1927).

Judgment of circuit court setting aside judgment by default rendered at a former term and reinstating cause on the docket of court for trial, was not a "final judgment," and was not appealable. *American Cotton Oil Co. v. La Valle House*, 148 Miss. 259, 114 So. 321, 1927 Miss. LEXIS 22 (Miss. 1927).

Order substituting another for complainant held appealable. *Miller v. Hay*, 143 Miss. 467, 106 So. 818, 1926 Miss. LEXIS 281 (Miss. 1926).

Decree of court of equity is final, which dismisses bill as to certain persons and claims, when no further hearing or proceeding is contemplated as to such claims or persons, though the decree is not final as to other claims in the bill, and further proceedings are to be taken as to some of the defendants. *Carter v. Kimbrough*, 122 Miss. 543, 84 So. 251, 1920 Miss. LEXIS 453 (Miss. 1920).

Nonsuit without prejudice is not a final judgment. *State ex rel. Brown v. Poplarville Sawmill Co.*, 119 Miss. 432, 81 So.

124, 1919 Miss. LEXIS 21 (Miss. 1919), overruled, *Solomon v. Continental Baking Co.*, 174 Miss. 890, 166 So. 376, 165 So. 607, 1936 Miss. LEXIS 215 (Miss. 1936).

Decree sustaining demurrer to bill and ordering transfer of cause to circuit court is appealable. *Robertson v. F. Goodman Dry Goods Co.*, 115 Miss. 210, 76 So. 149, 1917 Miss. LEXIS 203 (Miss. 1917).

However, where court sustained demurrer to a bill, and granted time to amend, an appeal from the order should be dismissed. *Armstrong v. Moore*, 112 Miss. 511, 73 So. 566, 1916 Miss. LEXIS 138 (Miss. 1916).

Voluntary dismissal or nonsuit by a plaintiff after defendant had moved for a peremptory instruction and the court had indicated its intention of giving such instruction was not a final judgment and not appealable. *Gulf & S. I. R. Co. v. Williams*, 109 Miss. 549, 68 So. 776, 1915 Miss. LEXIS 192 (Miss. 1915), overruled, *Solomon v. Continental Baking Co.*, 174 Miss. 890, 166 So. 376, 165 So. 607, 1936 Miss. LEXIS 215 (Miss. 1936).

Judgment, on defendants' plea in abatement in suit instituted by attachment, adjudging that attachment was wrongfully sued out and assessing defendants' damages, was a final judgment. *Chas. Brooks & Co. v. Gentry*, 108 Miss. 447, 66 So. 812, 1914 Miss. LEXIS 214 (Miss. 1914).

Decree vacating temporary injunction and dismissing bill was final and appealable. *Anderson v. Henderson*, 103 Miss. 211, 60 So. 137, 1912 Miss. LEXIS 157 (Miss. 1912).

Order allowing complainant 30 days to file amended bill after demurrer to complaint sustained is not appealable. *Moore v. Evans*, 98 Miss. 855, 54 So. 438, 1910 Miss. LEXIS 133 (Miss. 1910).

Appeal from an order granting a new trial is not from final judgment and will be dismissed. *Yazoo & M. V. R. Co. v. Reid*, 90 Miss. 616, 43 So. 952, 1907 Miss. LEXIS 99 (Miss. 1907).

Ruling on demurrer in action at law, not reviewed where no final judgment rendered by the trial court. *Pine Lumber Co. v. Covington County*, 87 Miss. 706, 40 So. 260, 1905 Miss. LEXIS 200 (Miss. 1905); *Tate County v. Bourland*, 42 So. 379 (Miss.

1906); *Davis v. Woods*, 95 Miss. 432, 48 So. 961, 1909 Miss. LEXIS 249 (Miss. 1909).

The Supreme Court is without jurisdiction of an appeal in a criminal case which is prosecuted before judgment from a verdict convicting the appellant, and will of its own motion dismiss the same. *Hayden v. State*, 81 Miss. 55, 32 So. 922, 1902 Miss. LEXIS 130 (Miss. 1902).

A decree sustaining or dismissing a bill of review is a final decree from which an appeal will lie. *Gilleylen v. Martin*, 73 Miss. 695, 19 So. 482, 1896 Miss. LEXIS 189 (Miss. 1896).

A decree directing a partition of land if it can be equitably done, and if not that the commissioners appointed to make the sale shall report accordingly to the next term, is an interlocutory and not a final decree. *Gilleylen v. Martin*, 73 Miss. 695, 19 So. 482, 1896 Miss. LEXIS 189 (Miss. 1896).

If plaintiff does not during the term obtain leave to amend, judgment sustaining demurrer to declaration, though not expressing that the action is dismissed, is final and may be appealed from. *Jacobs v. New York Life Ins. Co.*, 71 Miss. 656, 71 Miss. 658, 15 So. 639 (1894); *Dickerson v. Western Union Tel. Co.*, 111 Miss. 264, 71 So. 385, 1916 Miss. LEXIS 284 (Miss. 1916).

Decree on final account of administrator, which allows some items and disallows others, and awards payment of certain sums in partial distribution, is final, and may be appealed from without leave, although it continues the final account. *McDonald v. McDonald*, 68 Miss. 689, 9 So. 896, 1891 Miss. LEXIS 27 (Miss. 1891).

Order of circuit court sustaining motion for removal of cause to Federal court, not a final judgment from which an appeal can be prosecuted. *Jackson v. Alabama G. S. R. Co.*, 58 Miss. 648, 1881 Miss. LEXIS 17 (Miss. 1881).

15. Matters presented for review.

There are practical and institutional limitations upon the Supreme Court's ability to find facts; consequently, much deference is placed upon the trial judge's full discharge of his or her responsibility to make findings of fact as to the question

of whether Miranda rights have been intelligently, knowing and voluntarily waived. However, when the trial judge fails to make specific findings and only makes general findings thereby allowing admissibility of evidence, the Supreme Court's scope of review is considerably broader particularly when the trial judge's findings on the precise points at issue on appeal are not clearly inferable from the findings made. *McCarty v. State*, 554 So. 2d 909, 1989 Miss. LEXIS 499 (Miss. 1989).

Findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong; this is so whether the finding relates to evidentiary or ultimate fact questions. *Smith v. Smith*, 545 So. 2d 725, 1989 Miss. LEXIS 295 (Miss. 1989).

With respect to issues of fact where the chancellor made no specific finding, the Supreme Court proceeds on the assumption that the chancellor resolved all such fact issues in favor of the appellee, or at least in a manner consistent with the decree. *Smith v. Smith*, 545 So. 2d 725, 1989 Miss. LEXIS 295 (Miss. 1989).

Where appeal with supersedeas was still pending in the court and issue remained open, Supreme Court could correct judgment awarding appellee impleaded fund which erroneously included interest on the fund, on motion, although judgment of circuit court was rendered against appellee rather than against the fund. *Gayden v. Kirk*, 208 Miss. 283, 44 So. 2d 410, 1950 Miss. LEXIS 247 (Miss. 1950).

Purchaser of real property who refuses to carry out contract to purchase on other grounds cannot, on appeal from judgment in favor of vendor, raise the objection to form of deed tendered that it required vendee to pay taxes, since grantor did not have opportunity to meet this objection, which he might have corrected had any request been made that he do so. *Vanlandingham v. Jenkins*, 207 Miss. 882, 43 So. 2d 578, 1949 Miss. LEXIS 399 (Miss. 1949).

Rule that question not raised in trial court cannot be raised for first time on appeal is subject to exception where alleged error affects fundamental rights of

the parties or public policy, if such will work no injustice to any party to the appeal. *Carter v. State*, 198 Miss. 523, 21 So. 2d 404, 1945 Miss. LEXIS 226 (Miss. 1945).

If the records show that the court adjudicated that a fact existed, the existence of which was essential to the court's acquiring jurisdiction over the party, the record is conclusive as against attack on appeal. *Gulf & S. I. R. Co. v. F. L. Riley Mercantile Co.*, 139 Miss. 158, 104 So. 81, 1925 Miss. LEXIS 136 (Miss.), writ of error dismissed, 269 U.S. 597, 46 S. Ct. 120, 70 L. Ed. 432, 1925 U.S. LEXIS 293 (U.S. 1925).

On issue raised by plea in abatement, finding was against defendant, and on appeal from judgment on the merits exonerating defendant, the cause was reversed and remanded to fix plaintiff's damages. An appeal was taken from the judgment fixing damages, and the bond recited that appeal was taken also from the judgment on the plea. Whether appellant was entitled to have reviewed the judgment on the plea could be determined on appeal from the final judgment. *Yazoo & M. V. R. Co. v. McNeely*, 121 Miss. 803, 83 So. 815, 1920 Miss. LEXIS 122 (Miss. 1920).

Correction of errors made by a court having full jurisdiction of the cause is committed solely to the Supreme Court on direct appeal. *Hinton v. Shedd*, 115 Miss. 208, 76 So. 144, 1917 Miss. LEXIS 200 (Miss. 1917).

Appeal from the final decree in an equity suit brings in review all interlocutory decrees adverse to the appellant to which due exception was taken and made of record. *Jackson v. Lemler*, 83 Miss. 37, 35 So. 306, 1903 Miss. LEXIS 10 (Miss. 1903).

16. Dismissal of appeal.

In an appeal from what was effectively, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal and was dismissed. *Evans v.*

Moore, 853 So. 2d 850, 2003 Miss. App. LEXIS 751 (Miss. Ct. App. 2003).

Supreme Court is without jurisdiction of case by appeal from order of circuit court sustaining demurrer to petition and granting appeal, and case so appealed must be dismissed. *Roach v. Black Creek Drainage Dist.*, 206 Miss. 794, 41 So. 2d 5, 1949 Miss. LEXIS 301 (Miss. 1949).

Appeal from court's refusal to modify divorce decree directing that parties' minor children be placed in certain boarding school for scholastic year and then be returned to mother's father for six weeks, then transferred to custody of father for six weeks was dismissed as moot on mother's motion where the scholastic term and the two successive six weeks' periods had expired. *Savell v. Savell*, 206 Miss. 55, 39 So. 2d 532, 1949 Miss. LEXIS 241 (Miss. 1949).

Appellant cannot dismiss appeal unless granted right to do so by the court. *Wolf v. Mississippi Valley Trust Co.*, 130 Miss. 144, 93 So. 581, 1922 Miss. LEXIS 192 (Miss. 1922).

Where it appears that all of the principles of the case cannot be settled on the appeal, the appellant will be allowed to dismiss it. *Wolf v. Mississippi Valley Trust Co.*, 130 Miss. 144, 93 So. 581, 1922 Miss. LEXIS 192 (Miss. 1922).

Assignment of error not considered when decision of the question it presents will have no effect upon the rights of appellant. *Ramsay v. Ramsay*, 125 Miss.

185, 87 So. 491, 1921 Miss. LEXIS 113 (Miss. 1921).

Appeal dismissed where real purpose is not to obtain a reversal of the decree but to have it affirmed. *Smith v. Citizens' Bank & Trust Co.*, 125 Miss. 139, 87 So. 488, 1920 Miss. LEXIS 341 (Miss. 1920).

The Supreme Court is without jurisdiction of an appeal in a criminal case which is prosecuted before judgment from a verdict convicting the appellant, and will of its own motion dismiss the appeal. *Hayden v. State*, 81 Miss. 55, 32 So. 922, 1902 Miss. LEXIS 130 (Miss. 1902).

17. Statutory damages.

Statute (Code 1942, § 1971), providing for damages in case of unsuccessful appeals, is applicable only to final decrees and not to appeals from interlocutory decrees. *Canal Bank & Trust Co. v. Brewer*, 147 Miss. 885, 113 So. 552, 1927 Miss. LEXIS 358 (Miss. 1927); *Sample v. Romine*, 193 Miss. 736, 10 So. 2d 346 (Miss. 1942).

18. Limitations.

Constitution of 1890, § 104 and Code 1906, § 3096, providing that the statutes of limitation in civil cases shall not run against municipal corporations have no bearing on appeals. Section 3112 fixing the time for taking appeals must be construed with § 33 authorizing appeals. *Town of Tutwiler v. Gibson*, 117 Miss. 879, 78 So. 926, 1918 Miss. LEXIS 232 (Miss. 1918).

RESEARCH REFERENCES

ALR.

Appealability of order entered on motion to strike pleading. 1 A.L.R.2d 422.

Finality of judgment or decree for purposes of review as affected by provision for future accounting. 3 A.L.R.2d 342.

Right of trustee of express trust to appeal from order or decree not affecting his own personal interest. 6 A.L.R.2d 147.

Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor. 9 A.L.R.2d 984.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted. 10 A.L.R.2d 1075.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below. 11 A.L.R.2d 317.

Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant. 11 A.L.R.2d 607.

Appealability of order denying directed verdict or for judgment n. o. v. where movant has been granted new trial. 57 A.L.R.2d 1198.

Appealability of order setting aside, or refusing to set aside, default judgment. 8 A.L.R.3d 1272.

Reviewability of order denying motion

for summary judgment. 15 A.L.R.3d 899.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal had passed. 32 A.L.R.3d 1290.

Appealability of state court's order granting or denying motion to disqualify attorney. 5 A.L.R.4th 1251.

Appealability, under 28 USCS § 1291, of order awarding or denying attorneys' fees. 73 A.L.R. Fed. 271.

When will federal court of appeals review issue raised by party for first time on appeal where legal developments after trial affect issue. 76 A.L.R. Fed. 522.

Am. Jur.

15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 463.2 (Notice of motion – To

vacate judgment – Insufficiency of evidence and error of law).

18 Am. Jur. Pl & Pr Forms (Rev), Motions, Rules, and Orders, Form 5.1 (Notice of motion – To vacate or modify judgment – By stipulation of parties).

CJS.

4 C.J.S., Appeal and Error §§ 140-159, 213, 233, 419-421.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1, Fall, 2003.

§ 11-51-5. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 57, art. 1 (16); 1857, ch. 57, art. 17; 1871, § 2161; 1880, § 2682; 1892, § 2752; 1906, § 3112; Hemingway's 1917, § 2476; 1930, § 2323; 1942, § 753; Laws, 1916, ch. 222; Laws, 1926, ch. 153; Laws, 1954, ch. 214, §§ 1, 2 (¶¶ 1, 2), effective sixty days after passage (approved March 2, 1954); Am Laws, 1972, ch. 459, § 1]

Editor's Notes — Former § 11-51-5 related to time for appeals to the supreme court.

§ 11-51-7. Repealed.

Repealed by Laws of 1993, ch. 448, § 1, eff from and after passage (approved March 22, 1993).

[Codes, Hutchinson's 1848, ch. 54, art. 37; 1857, ch. 60, art. 102; 1871, § 1257; 1880, § 2311; 1892, § 34; 1906, § 35; Hemingway's 1917, § 10; 1930, § 14; 1942, § 1148; Laws, 1924, ch. 151; Am. Laws, 1978, ch. 335, § 10]

Editor's Notes — Former § 11-51-7 provided how and when interlocutory orders or decrees of the chancery court may be appealed.

§ 11-51-9. Decrees in matters testamentary.

The final decrees of chancery courts, and interlocutory orders or decrees named in this chapter, include such final or interlocutory decrees as may be made in matters testamentary and of administration, and in minors' business, and in cases of persons of unsound mind, unless it be otherwise expressly provided by a statute applicable to such cases.

HISTORY: Codes, 1880, § 2315; 1892, § 37; 1906, § 38; Hemingway's 1917, § 14; 1930, § 17; 1942, § 1151.

Cross References — All orders that meet requirements of Miss. Rules of Appellate Procedure Rule 5 may be considered on interlocutory appeal, see Miss. R. App. P. 1 and 5.

JUDICIAL DECISIONS

1. In general.

An appeal may not be taken from the appointment of a guardian for an incompetent for the purpose of bringing a suit to

set aside his conveyance, by the persons against whom such suit is to be brought. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844, 1959 Miss. LEXIS 484 (Miss. 1959).

RESEARCH REFERENCES

ALR.

Right of appeal from order on application for removal of personal representative, guardian, or trustee. 37 A.L.R.2d 751.

Right of executor or administrator to appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Appealability of probate orders allowing

or disallowing claims against estate. 84 A.L.R.4th 269.

Am. Jur.

4 Am. Jur. 2d (Rev), Appellate Review §§ 171- 173.

CJS.

4 C.J.S., Appeal and Error § 221.

§ 11-51-11. Appeal from judgment of criminal contempt.

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal. Where the punishment is either a fine only, or jail confinement only, the appeal shall be allowed upon the posting of a bond, payable to the state, with sufficient sureties, not exceeding One Thousand Dollars (\$1,000.00), conditioned to abide the results of the appeal. Where the punishment is both a fine and jail confinement, the appeal shall be allowed upon the posting of a bond, not exceeding Two Thousand Dollars (\$2,000.00), conditioned to appear in the court to which the appeal is prosecuted and to abide the results of such appeal.

(2) The amount of the bonds provided for in subsection (1) of this section shall be fixed by the tribunal appealed from, shall be approved by the sheriff or other officer in whose custody the appellant may be and shall not be construed as a limitation on the amount of any fine which may be imposed.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas.

(4) The burden of proof in criminal contempt shall be proof beyond a reasonable doubt. A contemnor shall not be entitled to a jury trial unless the contemnor requests a jury trial and unless the fine exceeds Five Hundred Dollars (\$500.00), or the imprisonment exceeds six (6) months.

HISTORY: Codes, 1880, § 2316; 1892, § 38; 1906, § 39; Hemingway's 1917, § 15; 1930, § 18; 1942, § 1152; Laws, 1978, ch. 335, § 11; Laws, 1981, ch. 369, § 1, eff from and after July 1, 1981.

Cross References — Bills of exception generally, see § 11-7-211.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Criminal contempt.
3. Punishment.
4. Bonds.

1. In general.

The factual findings of a chancery court in a civil contempt case are affirmed unless manifest error is present and apparent. However, the Supreme Court is not bound by the manifest error rule when reviewing an appeal of a conviction of criminal contempt; reviewing proceeds ab initio to determine whether on the record the contemnor is guilty of contempt beyond a reasonable doubt. *Premeaux v. Smith*, 569 So. 2d 681, 1990 Miss. LEXIS 628 (Miss. 1990).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under § 99-35-103(b); there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. *Common Cause of Mississippi v. Smith*, 548 So. 2d 412, 1989 Miss. LEXIS 362 (Miss. 1989).

Under this statute, the Supreme Court must decide from the record whether the appellant was actually guilty of contempt, and in so doing the Court is not held to the rule that they will not reverse unless the chancellor is manifestly wrong. *Prestwood v. Hambrick*, 308 So. 2d 82, 1975 Miss. LEXIS 1832 (Miss. 1975).

Under this section [Code 1942, § 1152] a husband had a right to appeal with supersedeas from his conviction of contempt for failure to pay child support. *Mullen v. Mullen*, 248 So. 2d 786, 1971 Miss. LEXIS 1482 (Miss. 1971).

An appeal from a judgment of civil contempt was properly based on this section [Code 1942, § 1152]. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

The application of this section [Code 1942, § 1152] is not limited to criminal contempts. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

This statute is designed to protect a person convicted of any kind of contempt, by fixing specific amounts for his appeal and appearance bonds, and by giving the Supreme Court a broader than usual review of the decision of the trial court. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

On appeals from a judgment for contempt of court, the Supreme Court will decide for itself the question of contempt. *Evers v. State*, 241 Miss. 560, 131 So. 2d 653, 1961 Miss. LEXIS 374 (Miss. 1961).

In an appeal from a conviction for contempt, the Supreme Court is not held to the rule that it will not reverse unless the chancellor is manifestly wrong, but is empowered to review the case and decide for itself whether there had been an actual contempt of court. *Ballew v. Case*, 232 Miss. 183, 98 So. 2d 451, 1957 Miss. LEXIS 458 (Miss. 1957).

Appellant, who claimed that certain household goods and an automobile which had been in possession of the decedent belonged to his wife and his principal, respectively, was not guilty of contempt of court by filing replevin action against the administratrix, in her individual capacity, to recover possession of the property while the estate was in process of administration. *Ballew v. Case*, 232 Miss. 183, 98 So. 2d 451, 1957 Miss. LEXIS 458 (Miss. 1957).

Court's knowledge in contempt case should be reflected in judgment for purposes of review. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485, 1930 Miss. LEXIS 208 (Miss. 1930).

Judgment for contempt should be clear and explicit to constitute *res judicata*, and warrant appellate court in affirming, reversing, annulling, or modifying it. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485, 1930 Miss. LEXIS 208 (Miss. 1930).

Judgment, in effect reciting court found respondent guilty of contempt, but leaving

time and manner to conjecture, could not be maintained. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485, 1930 Miss. LEXIS 208 (Miss. 1930).

In proceeding for direct contempt, contemnor should be permitted to make statement and apology, and courteously state views to have them incorporated in bill of exceptions. *Ex parte Redmond*, 156 Miss. 582, 126 So. 485, 1930 Miss. LEXIS 208 (Miss. 1930).

An appeal can be taken only from a final judgment or decree. *Eure v. Taylor*, 126 Miss. 155, 88 So. 514, 1921 Miss. LEXIS 20 (Miss. 1921).

The court being the trier of facts in criminal contempt proceedings, it is presumed that he followed the evidence in finding facts showing guilt. *Durham v. State*, 97 Miss. 549, 52 So. 627, 1910 Miss. LEXIS 252 (Miss. 1910).

A decree adjudging a party guilty of contempt and providing that unless he purges himself thereof within a designated time the court will adjudge punishment, is interlocutory and non-appealable. *Nutt v. State*, 95 Miss. 422, 49 So. 145, 1909 Miss. LEXIS 259 (Miss. 1909); *Eure v. Taylor*, 126 Miss. 155, 88 So. 514, 1921 Miss. LEXIS 20 (Miss. 1921).

2. Criminal contempt.

In a child custody case, there was sufficient evidence to support a conviction for constructive criminal contempt based on a failure to comply with visitation and a failure to provide an accounting of college funds. Even though some of the facts were disputed, it was admitted that there was a violation of a visitation order, and several explanations were given for this conduct. *Davis v. Davis*, 17 So. 3d 114, 2009 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

A contemnor was denied due process of law where the show cause hearing for the contempt charges was conducted by the same judge who presided over the divorce proceedings and the related motion for recusal from which the alleged contempt originated, the contemnor was charged with a course of conduct that was committed, for the most part, outside the presence of the court, his conduct associated

with the divorce proceedings involved the judge personally, and the judge chose to set a show cause hearing at a date subsequent to the alleged contemptuous conduct. *Purvis v. Purvis*, 657 So. 2d 794 (Miss. 1994), on rehearing (Miss. Apr. 27, 1995).

The evidence was sufficient to support a conviction of an attorney for criminal contempt based on the violation of a court order prohibiting communication with jurors after the return of the verdict, where the attorney admitted to being present in the courtroom when the judge read the order twice, the attorney contacted two jurors and attempted to have them discuss items relevant to the case with him by pretending to have authority from the judge to contact the jurors, and the conversations between the attorney and the jurors indicated the attorney's knowledge of the order, even though the attorney claimed that he did not comprehend the order because of a hearing problem and fatigue as a result of the trial. *Lawson v. State*, 573 So. 2d 684, 1990 Miss. LEXIS 803 (Miss. 1990).

Criminal contempt was not proven beyond a reasonable doubt, in spite of the antagonistic behavior of an adjoining landowner who had been unsuccessful in a boundary dispute action, where there was no proof that the landowner aided the lessee in continuing farming operations on the land, the landowner testified that he moved the court-ordered property line stakes so that the farming machinery would not run over them, and the landowner did not pose any real threat to other adjoining landowners, even though he made reference to a "smoking stick" during a verbal altercation, since he did not have a gun and there was no testimony that the other landowners felt so threatened as to abandon the survey of the land. *Mabry v. Howington*, 569 So. 2d 1165, 1990 Miss. LEXIS 560 (Miss. 1990).

A citation for criminal contempt is to vindicate the dignity and authority of the court. A citation is proper only when the contemnor has willfully, deliberately and contumaciously ignored the court. A decree which defines with reasonable specificity what the alleged contemnor must do or refrain from doing is prerequisite to a

citation. The burden of proving the criminal contempt is on the party asserting it. The guilt of the contemnor must be established beyond a reasonable doubt for a conviction of criminal contempt. *Premeaux v. Smith*, 569 So. 2d 681, 1990 Miss. LEXIS 628 (Miss. 1990).

Attorney who aids client in denying visitation rights to client's former spouse when client petitions court for modification of custody and visitation, only to confront congested court calendar and legitimate trial preparation needs and scheduling conflicts of opposing counsel, as result of which immediate hearing cannot be had, is not guilty of criminal contempt; furthermore, where judge whose court or order has allegedly been offended by conduct of attorney has substantial personal involvement in bringing and prosecution of criminal contempt proceedings, he may not adjudge attorney's guilt. *Cook v. State*, 483 So. 2d 371, 1986 Miss. LEXIS 2393 (Miss. 1986).

This section [Code 1942, § 1152] is the only statute authorizing an appeal from conviction of criminal contempt. *Masonite Corp. v. International Woodworkers of America*, 206 So. 2d 171, 1967 Miss. LEXIS 1242 (Miss. 1967).

In the absence of proof in the record sufficient to convict beyond a reasonable doubt, conviction for constructive criminal contempt was not sustained. *Brannon v. State*, 202 Miss. 571, 29 So. 2d 916, 1947 Miss. LEXIS 319 (Miss. 1947).

3. Punishment.

A divorced wife appealing from a judgment of contempt of court for her failure to return a house to her divorced husband in good condition in violation with the provisions of the divorce decree, could enter a plea for mitigation of punishment by rea-

son of insanity, for the first time on appeal. *Adair v. Holden*, 222 So. 2d 834, 1969 Miss. LEXIS 1562 (Miss. 1969).

Appeal from a decree of conviction of contempt does not lie where the decree imposes no fine or punishment of any kind. *Bond v. Anderson*, 203 Miss. 283, 33 So. 2d 833, 1948 Miss. LEXIS 265 (Miss. 1948).

4. Bonds.

On an appeal from a judgment of civil contempt, the question as to the sufficiency of the appeal bond is not governed by Code 1942, § 1162, but by this section [Code 1942, § 1152]. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

Where a sheriff, who had been judged guilty of contempt of court, made no effort to file an appeal bond, and, after the time for an appeal had expired, the county judge directed the issuance of a *capias* pro fine to the coroner, who took the sheriff into custody, whereupon the sheriff petitioned the circuit court for a writ of habeas corpus, which was made returnable before the county judge, the trial judge in the habeas corpus proceedings did not have the power then to permit the sheriff to execute bonds and thereby effectually appeal the contempt judgments to the circuit court of the county. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

Since the sheriff, in his contemptuous acts was not representing the county, and it had no beneficial interest in his conviction or acquittal, the sheriff was not exempt by Code 1942, § 1210, from executing a bond upon appealing from contempt judgments. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

OPINIONS OF THE ATTORNEY GENERAL

Conviction of contempt for failing to pay previously assessed fines is appealable under the provisions of this section or § 11-51-12. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A separate appeal bond is required for each case in which a contempt finding is

made. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A defendant has the right to appeal a contempt conviction, but not the sentence. His appeal would be limited to whether or not he was guilty of contempt. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

RESEARCH REFERENCES

ALR.

Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 A.L.R.3d 650.

Appealability of contempt adjudication or conviction. 33 A.L.R.3d 589.

Oral communications insulting to particular state judge, made to third party out of judge's physical presence, as criminal contempt. 30 A.L.R.4th 155.

Right to appointment of counsel in contempt proceedings. 32 A.L.R.5th 31.

Am. Jur.

4 Am. Jur. 2d (Rev), Appellate Review §§ 182- 184.

17 Am. Jur. 2d, Contempt § 101.

CJS.

4 C.J.S., Appeal and Error §§ 268, 269.

17 C.J.S., Contempt §§ 207-242.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-12. Appeal from judgment of civil contempt.

(1) A person ordered by any tribunal, except the Supreme Court, to be punished for a civil contempt, may appeal to the court to which other cases are appealable from said tribunal. If jail confinement is ordered to compel the payment of any monetary sum, the contemnor shall be allowed to appeal upon the execution of an appearance bond, payable to the appellee, with sufficient sureties, in the penalty of one hundred twenty-five percent (125%) of such sum as he has been adjudicated in contempt for failure to pay, unless the court shall determine that a lesser bond should be required. The bond shall be conditioned to abide the results of the appeal.

(2) Where the punishment for civil contempt is other than jail confinement, the contemnor shall be allowed to appeal upon the posting of a bond, payable to the appellee, with sufficient sureties, to be approved by the tribunal appealed from, in an amount to be fixed by such tribunal, conditioned to abide the results of the appeal.

(3) All appeals allowed in accordance with the provisions of this section shall operate as a supersedeas.

(4) The burden of proof in civil contempt shall be proof by a preponderance of the evidence.

HISTORY: Laws, 1981, ch. 369, § 2; Laws, 1991, ch. 573, § 80, eff from and after July 1, 1991.

Cross References — Stay or injunction pending appeal, see Miss. R. App. P. 8.

Procedural requirements for appeals to circuit courts in civil cases, see MRCrP 18.1, 29.1 through 29.5, and 30.1.

JUDICIAL DECISIONS

1. In general.

In a child custody proceedings, the evidence was sufficient to support a finding of civil contempt based on a mother's failure

to provide an accounting of certain college funds; the mother was unable to testify with certainty that the accounting was ever filed with the chancery clerk as or-

dered by the court. *Davis v. Davis*, 17 So. 3d 114, 2009 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 436 (Miss. 2009).

In a divorce matter, a chancellor's decision to disbelieve a contemnor when the contemnor asserted that the contemnor did not have an ability to pay was supported by the record because the contemnor failed to show, by a preponderance of the evidence, an inability to pay; moreover, the chancellor chose to disbelieve the contemnor's assertions because, among other things, the contemnor had previously manufactured figures and understated the contemnor's income. *Stribling v. Stribling*, 960 So. 2d 556, 2007 Miss. App. LEXIS 1 (Miss. Ct. App. 2007).

There are several available defenses to a civil contempt charge. One defense is that whatever violation there may have been of a decree or order was not wilful or deliberate such that the behavior in question may not be labeled as contumacious. Included in this defense may be an honest inability to perform according to the dictates of the order or decree. Another available defense is the traditional notion of "clean hands." A third defense is that of an inability to obey an order which is vague or not sufficiently specific. *Smith v. Smith*, 545 So. 2d 725, 1989 Miss. LEXIS 295 (Miss. 1989).

A person convicted of criminal or civil contempt may appeal to the Supreme Court pursuant to § 11-51-11 and § 11-51-12. Also, a plaintiff in a civil contempt case may appeal by authority of § 11-51-3, which authorizes appeals from final judgments in civil cases. An appeal from a dismissal of a petition for criminal contempt does not lie under § 99-35-103(b); there is no statute authorizing an appeal by the petitioner when a trial court has dismissed a petition for criminal contempt. *Common Cause of Mississippi v. Smith*, 548 So. 2d 412, 1989 Miss. LEXIS 362 (Miss. 1989).

Father who was imprisoned for civil contempt because of failure to pay past due child support was entitled to release pending appeal in accordance with the terms and conditions of Mississippi Code § 11-51-12. *Jones v. Hargrove*, 493 So. 2d 346, 1986 Miss. LEXIS 2554 (Miss. 1986).

Mother's proposal that the appearance bond, required of father to secure his release from custody pending appeal, should be conditioned so that, in the event Supreme Court affirmed the lower court's contempt order, payment of child support average would be forthcoming was beyond the requirement of Mississippi Code § 11-51-12. *Jones v. Hargrove*, 493 So. 2d 346, 1986 Miss. LEXIS 2554 (Miss. 1986).

OPINIONS OF THE ATTORNEY GENERAL

Conviction of contempt for failing to pay previously assessed fines is appealable under the provisions of § 11-51-12 or this section. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A defendant has the right to appeal a contempt conviction, but not the sentence.

His appeal would be limited to whether or not he was guilty of contempt. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

A separate appeal bond is required for each case in which a contempt finding is made. *Markopoulos*, Nov. 19, 2004, A.G. Op. 04-0566.

RESEARCH REFERENCES

ALR.

Appealability of acquittal from or dismissal of charge of contempt of court. 24 A.L.R.3d 650.

Appealability of contempt adjudication or conviction. 33 A.L.R.3d 589.

Oral communications insulting to particular state judge, made to third party out of judgment's physical presence, as criminal contempt. 30 A.L.R.4th 155.

Right to appointment of counsel in contempt proceedings. 32 A.L.R.5th 31.

Am. Jur.

17 Am. Jur. 2d (Rev), Contempt § 3.

CJS.

4 C.J.S., Appeal and Error §§ 268, 269.

§§ 11-51-13 and 11-51-15. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-13. [Codes, 1871, §§ 410, 1250; 1880, § 2317; 1892, § 40; 1906, § 41; Hemingway's 1917, § 17; 1930, § 20; 1942, § 1154]

§ 11-51-15. [Codes, 1871, § 2841; 1880, § 2318; 1892, § 41; 1906, § 42; Hemingway's 1917, § 18; 1930, § 21; 1942, § 1155; Am. Laws, 1978, ch. 335, § 12]

Editor's Notes — Former § 11-51-13 related to how appeal obtained; by petition to clerk except in certain cases.

Former § 11-51-15 related to the petition for appeal.

§ 11-51-17. One of several parties may appeal; failure to join appeal.

Any one or more of the parties to a judgment or decree may appeal therefrom. If all the parties to a judgment after receiving notice thereof in the time required by the Supreme Court do not join the appeal, they shall not afterward have the right of appeal, and the judgment of the court below shall remain in full force against them.

HISTORY: Codes, 1857, ch. 62, art. 107; 1871, § 1258; 1880, § 2319; 1892, § 42; 1906, § 43; Hemingway's 1917, § 19; 1930, § 22; 1942, § 1156; Laws, 1991, ch. 573, § 81, eff from and after July 1, 1991.

Cross References — Return-days for appeals, see § 11-3-3.

Appeal as of right, how taken, see Miss. R. App. P. 3.

Filing and service, see Miss. R. App. P. 25.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Issuance of summons.
3. Failure to issue summons, effect of.
4. —Time for objection.
5. Necessary parties.

1. In general.

The purpose of the statute is to prevent the splitting of appeals. *Duckworth v. Alis-Chalmers Mfg. Co.*, 247 Miss. 198, 150 So. 2d 163, 1963 Miss. LEXIS 293 (Miss. 1963).

Where plaintiffs brought an action against a city and landowner, among others, for injury sustained by the fall of a

tree upon their automobile, and the landowner entered his appearance but filed no defensive pleadings, order of the trial court sustaining demurrer to an amended petition had the effect of finally dismissing plaintiff's entire suit upon the failure to plead further within the time allowed and finally disposed of the case as to the landowner, and neither this section nor chapter 259, Laws of 1952 ([Code 1942, § 1156] § 335.5), precluded plaintiff's appeal from the trial court's action. *Barron v. Natchez*, 229 Miss. 276, 90 So. 2d 673, 1956 Miss. LEXIS 607 (Miss. 1956).

Final decree against certain named defendants where not all of the defendants were even in court by any known valid

form of process, which decree was wholly ineffectual and validly accomplished no purpose sought by the complainant, would be reversed and remanded pursuant to appeal by some of the defendants. *Dorsey v. Sullivan*, 199 Miss. 602, 24 So. 2d 852, 1946 Miss. LEXIS 231 (Miss. 1946).

Summons and severance requirement of statute respecting appeal is procedural only, and not jurisdictional, purpose being to prevent splitting of appeals. *Hartford Acci. & Indem. Co. v. N. O. Nelson Mfg. Co.*, 167 Miss. 63, 146 So. 889, 1933 Miss. LEXIS 93 (Miss. 1933).

Statutory provision for summons and severance when all parties to decree do not join in appeal held inapplicable to appeals from county to circuit courts. *Barber v. Loveland*, 166 Miss. 625, 146 So. 854, 1933 Miss. LEXIS 357 (Miss. 1933).

Complainants, seeking separate and distinct judgment, cannot file cross-assignment of errors to defendants' appeal, transferring controversy with other complainant. *Walter Fisher Co. v. I. Lowenberg & Co.*, 149 Miss. 761, 116 So. 91, 1928 Miss. LEXIS 89 (Miss. 1928).

Within statutory period, one or more parties to judgment may appeal without consent of others. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707, 1928 Miss. LEXIS 58 (Miss. 1928).

2. Issuance of summons.

Where a landlord brought an action against a tenant and others who were claiming to have an interest in lease for rent owing and possession of premises, and a judgment was rendered against the tenant and others and their sureties, even though the tenant did not appeal the others in interest with the tenant and their sureties could prosecute an appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829, 1955 Miss. LEXIS 542 (Miss. 1955).

Those summoned to join in appeal must give bond, and they cannot join after cause has proceeded to judgment. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707, 1928 Miss. LEXIS 58 (Miss. 1928).

After expiration of 6 months from rendition of judgment, parties summoned cannot join in appeal. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707, 1928 Miss. LEXIS 58 (Miss. 1928).

Where one defendant appeals by giving supersedeas bond a summons should issue to the other judgment defendants before proceeding to final hearing, and if appellant does not issue such summons the appellee should have it issued or move to dismiss the appeal, and if no summons is issued no execution can be issued on the judgment superseded. *United States Fidelity & Guaranty Co. v. Jackson*, 123 Miss. 676, 86 So. 456, 1920 Miss. LEXIS 69 (Miss. 1920).

Where all parties against whom judgment was rendered did not join in appeal and no summons was issued to those not joined, the appellee may have such summons issued. *Tardy v. Rosenstock*, 118 Miss. 720, 80 So. 1, 1918 Miss. LEXIS 124 (Miss. 1918).

3. Failure to issue summons, effect of.

Where parties permitted cause to proceed to judgment, validity cannot be questioned on ground summons to other parties not joining in appeal was not issued, and cause will not be remanded to docket for that purpose. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707, 1928 Miss. LEXIS 58 (Miss. 1928).

Where one defendant appeals by giving a supersedeas bond and no summons is issued, no execution can be issued on the judgment superseded, since if the appellant does not issue summons for the other judgment defendants the appellee should have it issued or move to dismiss the appeal. *United States Fidelity & Guaranty Co. v. Jackson*, 123 Miss. 676, 86 So. 456, 1920 Miss. LEXIS 69 (Miss. 1920).

Where judgment was rendered against several defendants and an appeal taken in which one of the defendants did not join and for whom no summons was issued requiring him to join, the Supreme Court will either dismiss appeal or require statute to be complied with before consideration by court. *Tardy v. Rosenstock*, 118 Miss. 720, 80 So. 1, 1918 Miss. LEXIS 124 (Miss. 1918).

Where judgment was rendered against a firm, and it does not appear that there was any summons and severance so as to conclude one of the partners, the other cannot alone appeal. *Gibson v. Carr*, 91 Miss. 773, 45 So. 864, 1907 Miss. LEXIS 202 (Miss. 1907).

4. —Time for objection.

Contention based on fact that appellant's co-complainants in trial court did not appeal, and that there was no summons and severance, could not be made for first time on suggestion of error. *Hamel v. Marlow*, 171 Miss. 559, 157 So. 255, 157 So. 905, 1934 Miss. LEXIS 222 (Miss.), set aside, 171 Miss. 565, 157 So. 905 (Miss. 1934).

Objection that all parties to decree were not joined in appeal from county to circuit

court could not be raised for first time in Supreme Court. *Barber v. Loveland*, 166 Miss. 625, 146 So. 854, 1933 Miss. LEXIS 357 (Miss. 1933).

5. Necessary parties.

Sureties on bond on appeal to circuit court were not necessary parties to appeal. *Wilson v. Lexington*, 153 Miss. 209, 119 So. 795, 1929 Miss. LEXIS 1 (Miss. 1929).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 260.

CJS.

4A C.J.S., Appeal and Error §§ 29, 264, 273-276, 290, 294-297, 348, 353-387.

§ 11-51-19. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 43; 1906, § 44; Hemingway's 1917, § 20; 1930, § 23; 1942, § 1157]

Editor's Notes — Former § 11-51-19 related to when appeal returnable if issued by the clerk of the supreme court.

§ 11-51-21. Bond to be given by parties who join in the appeal.

If the parties summoned to join in the appeal desire to do so, they must comply with the requirements to perfect an appeal as if they had appealed in the first instance, or they shall not be allowed to join in said appeal. Such compliance shall be made within the time required by the Supreme Court, and if a supersedeas bond be filed, may be approved by the Clerk of the Supreme Court, or the clerk of the court from whose judgment the appeal was taken, and certified and filed in the office of the Clerk of the Supreme Court.

HISTORY: Codes, 1880, § 2320; 1892, § 44; 1906, § 45; Hemingway's 1917, § 21; 1930, § 24; 1942, § 1158; Laws, 1978, ch. 335, § 13; Laws, 1991, ch. 573, § 82, eff from and after July 1, 1991.

Cross References — Circuit court restrictions on who may sign bonds, see Uniform Rules of Circuit and County Court Practice Rule 1.07.

Appeal as of right, when taken, see Miss. R. App. P. 4.

JUDICIAL DECISIONS

1. In general.

The purpose of the statute is to prevent the splitting of appeals. *Duckworth v. Alis-Chalmers Mfg. Co.*, 247 Miss. 198, 150

So. 2d 163, 1963 Miss. LEXIS 293 (Miss. 1963).

Those summoned to join in appeal must give bond, and they cannot join after

cause has proceeded to judgment. *Wilkinson v. Love*, 149 Miss. 523, 115 So. 707, 1928 Miss. LEXIS 58 (Miss. 1928).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 292, 294.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 461.1 (notice – motion for order dispensing with or limiting security); Form 491.1 (notice – motion for order that security is insufficient).

CJS.

4A C.J.S., Appeal and Error §§ 325.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-23. Execution when suspended as to some parties.

If only part of those against whom a judgment or decree is rendered appeal and supersede its execution, an execution may be issued against all, and the clerk issuing it shall note on it the fact of the supersedeas as to those who appeal, and it shall be executed only as to the others.

HISTORY: Codes, 1880, § 2321; 1892, § 45; 1906, § 46; Hemingway's 1917, § 22; 1930, § 25; 1942, § 1159.

Cross References — Executions generally, see §§ 13-3-111 et seq.

§ 11-51-25. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2322; 1892, § 46; 1906, § 47; Hemingway's 1917, § 23; 1930, § 26; 1942, § 1160; Am Laws, 1978, ch. 335, § 14]

Editor's Notes — Former § 11-51-25 related to petition not necessary to the validity of appeal.

§ 11-51-27. Terms for granting appeal.

An appeal may be granted by the court in all cases, upon terms prescribed, which shall include payment of all costs in the lower court.

HISTORY: Codes, Hutchinson's 1848, ch. 63, art. 2, § 150; 1857, ch. 62, art. 108; 1871, § 1250; 1880, § 2323; 1892, § 47; 1906, § 48; Hemingway's 1917, § 24; 1930, § 27; 1942, § 1161; Laws, 1978, ch. 335, § 15; Laws, 1991, ch. 573, § 83, eff from and after July 1, 1991.

Cross References — Computation and extension of time, see Miss. R. App. P. 26.

RESEARCH REFERENCES

CJS.

4 C.J.S., Appeal and Error § 402.

Law Reviews.

1979 Mississippi Supreme Court Re-

view: Civil Procedure. 50 Miss. L. J. 719,
December 1979.

§ 11-51-29. Prepayment of costs in civil cases on appeal.

On appeals from decrees overruling demurrers or other interlocutory orders or decrees, or where the appeal is granted to settle the principles of the case, or on appeals from final judgments of a circuit court in civil cases, or from final decrees of a chancery court including cases where the circuit court or chancery court has acted as an appellate court, the appellant shall prepay all of the costs in the lower court including the cost of the preparation of the record of the proceedings in the trial court, and fee prescribed in Section 25-7-3, to the clerk of the court from which the appeal is taken.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 2, § 37; 1857, ch. 62, art. 104; 1871, § 1252; 1880, § 2334; 1892, § 48; 1906, § 49; Hemingway's 1917, § 25; 1930, § 28; 1942, § 1162; Laws, 1896, ch. 90; Laws, 1978, ch. 335, § 16, eff from and after July 1, 1978.

Cross References — Power of supreme and circuit judges and chancellors to grant writ of supersedeas, see § 9-1-19.

Power of county judge to issue writ of supersedeas, see § 9-9-23.

Motion to discharge supersedeas, see § 11-3-21.

Judgment on bond for supersedeas, see § 11-3-27.

Exception to sufficiency of bond for supersedeas, see § 11-3-33.

Deposit for costs, see §§ 11-51-69, 99-35-107.

Appeals from county court operating as supersedeas, see § 11-51-79.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Sufficiency.
3. Operation.
4. Sureties.
5. Statutory damages.

1. In general.

Although § 11-51-29 may be interpreted to require all court costs to be prepaid upon the taking of an appeal, the statutory language is subject to Supreme Court Rule 11(b)(1) which clearly limits prepaid costs to those essential to the processing of the appeal. In *re Newsom*, 536 So. 2d 1, 1988 Miss. LEXIS 393 (Miss. 1988).

An appeal taken to the Supreme Court either by means of prepaying the costs in the lower court and the fee required by § 25-7-3 or by means of filing in the office of the Clerk of the Supreme Court a tran-

script of the record of the case (§ 11-51-25 [Repealed]) is taken when the costs are prepaid as provided in §§ 11-51-29 and 11-51-61 [Repealed]; since an appeal must be taken within 45 days after the rendition of the judgment or decree (§ 11-51-5 [Repealed]), the prepayment of costs must be accomplished within that period of time. *Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc.*, 384 So. 2d 1031, 1980 Miss. LEXIS 2011 (Miss. 1980), overruled, *Moran v. Necaise*, 437 So. 2d 1222, 1983 Miss. LEXIS 2928 (Miss. 1983).

Although an appeal was not perfected where appellant failed to prepay court costs and the filing fee within the forty-five-day time limit, the appeal would not be dismissed where a new statute requiring the prepayment of costs and fees for the perfection of an appeal had gone into effect shortly before the final judgment was rendered, where the appellant had made a good faith effort to timely perfect

the appeal under the old method, and where appellant was not timely presented with a bill of costs, as required by the new statute, but prepaid the cost bill as soon as presented. In future cases, if the clerk of the trial court fails to satisfy the statutory requirements as to the bill of costs, the attorney of record desiring an appeal must make a motion in writing to the trial judge, within the allotted forty-five-days, compelling production of the costs bill from the trial court clerk and, absent such a written motion within the time for appeal, the appeal will be dismissed for lack of jurisdiction. *Allgood v. Allgood*, 367 So. 2d 450, 1979 Miss. LEXIS 2213 (Miss. 1979), overruled, *Moran v. Necaise*, 437 So. 2d 1222, 1983 Miss. LEXIS 2928 (Miss. 1983).

Legislative intent of amendments to §§ 11-51-25 [Repealed] and 11-51-29 is to require prepayment of costs as means to perfect appeal; failure to timely perfect appeal, which requires prepayment of costs and fees, is jurisdictional and requires dismissal. *Allgood v. Allgood*, 367 So. 2d 450, 1979 Miss. LEXIS 2213 (Miss. 1979), overruled, *Moran v. Necaise*, 437 So. 2d 1222, 1983 Miss. LEXIS 2928 (Miss. 1983).

Appellant's Motion for Stay of Execution and Motion for Leave to Appeal Without Supersedeas Bond did not toll the time allowed for appeal by Code 1972, § 11-51-5 [Repealed]. When it became apparent that no ruling would be had on the appellant's motions within the 45 day period, the appellant was required to post a cost bond as provided by Code 1972, § 11-51-29 within the 45 day period, and he could then have filed a motion to the Supreme Court for supersedeas as provided for in Code 1972, § 11-51-43. *Summer v. Henn*, 323 So. 2d 751, 1975 Miss. LEXIS 1575 (Miss. 1975).

This section [Code 1942, § 1162] and Code 1942, § 1163, which deal with appeal bonds generally in civil cases, were inapplicable to an appeal bond given on an appeal from a judgment of civil contempt. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

The furnishing of a bond by appellant and its approval, or a deposit in lieu

thereof, must be within the time allowed for appeal. *Hutchinson v. Ferrell*, 248 Miss. 700, 160 So. 2d 903, 1964 Miss. LEXIS 294 (Miss. 1964).

County board of education, and its president, as agents of the state, may appeal without giving bond. *County Board of Education v. Smith*, 239 Miss. 53, 121 So. 2d 139, 1960 Miss. LEXIS 266 (Miss. 1960).

This section [Code 1942, § 1162] did not apply in an appeal from the determination of the chancellor in an annexation proceeding. *Dodd v. Jackson*, 238 Miss. 372, 118 So. 2d 319, 1960 Miss. LEXIS 417 (Miss. 1960).

Where the circuit court, upon appeal, reviewed the case upon a record made in the county court, the contention of appellant, who undertook an appeal to the Supreme Court and deposited \$100.00 in cash with the circuit clerk in lieu of a bond, that "the cost of the transcript" meant solely the cost in the circuit court and did not include the cost previously accrued in the county court was rejected, since the quoted term meant the transcript upon which the appellant relied for his appeal, including the stenographer's notes of the testimony in county court, as well as other costs accrued in the appeal to the circuit court. *Walters v. Fine*, 232 Miss. 494, 95 So. 2d 229, 1957 Miss. LEXIS 485 (Miss. 1957).

Appellee could not file bond under this section [Code 1942, § 1162] and thereby prosecute appeal for appellant and move to advance cause on Supreme Court docket. *Gaudet v. Mayor & Board of Aldermen*, 42 So. 2d 808 (Miss. 1949).

Defect in appeal bond given in appeal from municipal ordinance to Circuit Court, in that it was signed only by the protestants as principals, and without the two sureties required by law, was waived by failure to object thereto in the circuit court; and, bond being amendable, defect did not deprive either the circuit court or supreme court of jurisdiction. *Neely v. Charleston*, 35 So. 2d 316 (Miss. 1948).

All defendants in the trial court must be specifically named as obligees in the appeal bond. *Williams v. J. E. Walton & Son*, 202 Miss. 641, 32 So. 2d 131, 1947 Miss. LEXIS 325 (Miss. 1947).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving bond for appeal to the supreme court. *Sabougla Drainage Dist. v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219, 2 So. 2d 573, 1941 Miss. LEXIS 109 (Miss. 1941).

Where an effort had been made in good faith by a drainage district to perfect an appeal within six months, and there had been no intentional delay in having the record filed with the clerk of the Supreme Court, and only a short delay in filing it, with no damage or prejudice to the other party, the Supreme Court in its discretion overruled a motion to dismiss the appeal on the ground of inexcusable delay in filing the transcript in the Supreme Court, and granted the drainage district permission to file the proper appeal bond within ten days. *Sabougla Drainage Dist. v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219, 2 So. 2d 573, 1941 Miss. LEXIS 109 (Miss. 1941).

That circuit court permitted alleged defective bond given on appeal from county court to be amended held not error. *Bassett v. Building & Loan Ass'n*, 164 Miss. 674, 145 So. 109, 1933 Miss. LEXIS 229 (Miss. 1933).

Failure to file \$100 appeal bond after prepaying cost of transcript requires dismissal of appeal. *Howell v. Miller*, 151 Miss. 372, 118 So. 178, 1928 Miss. LEXIS 314 (Miss. 1928).

An appeal bond is valid though executed and approved before the entry of the decree to be appealed from, and when the decree is entered will transfer the cause to the Supreme Court. *Hughes v. Kaw Inv. Co.*, 129 Miss. 434, 91 So. 702, 1922 Miss. LEXIS 18 (Miss. 1922).

2. Sufficiency.

On an appeal from a judgment of civil contempt, the question as to the sufficiency of the appeal bond is not governed by this section, but by Code 1942, § 1152. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

A deposit of money equal to the penalty of the bond does not satisfy the require-

ments of the statute for an appeal without supersedeas in a civil case except where the cost of the transcript is prepaid, in which event a deposit of \$100 may be made in view of the bond. *Snipes v. Commercial & Industrial Bank*, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

Under a statute providing that where appellant prepays cost of transcript, a bond for \$100 shall be sufficient or appellant may deposit that sum in cash with the clerk in lieu of the bond, and the appellants had not prepaid the cost of transcript within six months' period, an appeal would be dismissed. *Wooten v. Laurel*, 221 Miss. 652, 74 So. 2d 752, 1954 Miss. LEXIS 572 (Miss. 1954).

Deposit of \$100 with chancery clerk from which he deducted cost of making transcript of records was insufficient to comply with provision in this section [Code 1942, § 1162] permitting prepayment of costs of transcript and a \$100 deposit in lieu of bond; consequently, the appeal was not perfected under Code 1942, § 1174, so that a motion to advance cause on docket of Supreme Court was properly denied as prematurely made. *Gaudet v. Mayor & Board of Aldermen*, 42 So. 2d 808 (Miss. 1949).

The appeal bond of an appellant, not desiring a supersedeas, in the amount of \$100 is insufficient where appellant has not prepaid the cost of the transcript. *Williams v. J. E. Walton & Son*, 202 Miss. 641, 32 So. 2d 131, 1947 Miss. LEXIS 325 (Miss. 1947).

3. Operation.

There is nothing in this section which requires the clerk or any party to apply for an additional bond; The statute merely provides that such persons may apply for a greater bond if the cost of the appeal will exceed \$500. *Summer v. Henn*, 323 So. 2d 751, 1975 Miss. LEXIS 1575 (Miss. 1975).

To operate as supersedeas, one of conditions of bond must be that appellant will satisfy judgment or decree complained of. *Spiro v. Shapleigh Hardware Co.*, 153 Miss. 195, 119 So. 206, 1928 Miss. LEXIS 191 (Miss. 1928).

Where condition of bond was to pay Supreme Court's judgment and all costs, it

would not operate as supersedeas. *Spiro v. Shapleigh Hardware Co.*, 153 Miss. 195, 119 So. 206, 1928 Miss. LEXIS 191 (Miss. 1928).

An appeal with or without supersedeas has the same effect except that the former operates to stay execution. *Yazoo & M. V. R. Co. v. Adams*, 78 Miss. 977, 30 So. 44, 1901 Miss. LEXIS 152 (Miss. 1901).

4. Sureties.

Where trial court fixed the bond at \$1000 for an appeal without supersedeas and the appellant filed a petition for appeal and deposited cash without prepaying the transcript, this cash deposit did not satisfy the statutory requirement but the appellant should be given seven days to file a good and sufficient bond with proper sureties. *Snipes v. Commercial & Industrial Bank*, 225 Miss. 345, 82 So. 2d 895, 1955 Miss. LEXIS 590 (Miss. 1955).

A surety against whom judgment was

rendered in the lower court, along with its principal there, is not a sufficient surety on an appeal bond, whether the surety be personal or corporate. *Williams v. J. E. Walton & Son*, 202 Miss. 641, 32 So. 2d 131, 1947 Miss. LEXIS 325 (Miss. 1947).

Appeal bond must have more than one surety unless surety is guaranty company. *Champenois & Blanks v. Donald Co.*, 153 Miss. 719, 121 So. 485, 1929 Miss. LEXIS 77 (Miss. 1929).

A bond with but one surety is insufficient. *Pfiefer & Dreyfus v. Hartman*, 60 Miss. 505, 1882 Miss. LEXIS 90 (Miss. 1882).

5. Statutory damages.

Surety on appellant's cost bond held not liable for statutory penalty of 5 per cent on money judgment affirmed, such penalty not being a part of "costs." *Humphreys v. Thompson*, 130 So. 152 (Miss. 1930).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 292, 294.

Deposit in lieu of bond, 2 Am. Jur. Pl & Pr Forms (Rev ed), Appeal and Error, Forms 381-388.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 295, 296.

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4A C.J.S., Appeal and Error §§ 322-324, 337-340, 349-352.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-31. Bond for supersedeas.

(1) A supersedeas shall not be granted in any case pending before the Supreme Court, unless the party applying for it shall give bond as required by the Rules of the Supreme Court.

(2) In civil litigation under any legal theory, the appeal bond to be furnished during the pendency of all appeals or discretionary reviews by any appellate courts in order to stay the execution of any judgment granting legal, equitable, or other relief during the entire course of appellate review shall be set in accordance with applicable laws or court rules, except that the total appeal bond or other forms of security that are required of an appellant shall be in the amount of the judgment, but not to exceed fifty percent (50%) of the net worth of the appellant, and in no event shall the appeal bond exceed Thirty-five Million Dollars (\$35,000,000.00).

(3) Notwithstanding subsection (2) of this section, if an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may enter orders that:

(a) Are necessary to protect the appellee; and

(b) Require the appellant to post a bond in an amount up to the total amount of the judgment.

(4) In this section:

(a) "Civil litigation" includes, without limitation, cases involving individual, aggregated, class action, or otherwise joined claims.

(b) "Legal, equitable, or other relief" means all forms of relief including, without limitation, compensatory, special, punitive, exemplary or other damages, injunctive relief, or any other form of relief.

(c) "Dissipation of assets" shall not include expenditures, including payments to the owners of a business, of a kind that the appellant made in the regular course of business prior to entry of the judgment being appealed.

(5) The provisions of this section shall apply to all judgments entered on or after July 1, 2016, regardless of the date the civil litigation was filed.

HISTORY: Codes, Hutchinson's 1848, ch. 54, art. 2, §§ 34, 37; 1857, ch. 62, art. 105; 1871, § 1251; 1880, § 2325; 1892, § 49; 1906, § 50; Hemingway's 1917, § 26; 1930, § 29; 1942, § 1163; Laws, 1954, ch. 238; Laws, 1978, ch. 335, § 17; Laws, 1985, ch. 386; Laws, 1991, ch. 573, § 84; Laws, 2016, ch. 498, § 1, eff from and after July 1, 2016.

Cross References — Appeal with supersedeas to chancery court from suspension, cancellation or revocation of grain warehouseman's license, see § 75-44-25.

Application of this section to appeal with supersedeas from suspension, cancellation or revocation of license of pulpwood receiving facility, see § 75-79-21.

Circuit court restrictions on who may sign bonds, see Miss. Uniform Circuit and County Court Rule 1.07.

Interlocutory appeal by permission, see Miss. R. App. P. 5.

Stay or injunction pending appeal, see Miss. R. App. P. 8.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Bond on supersedeas.
3. Rights and liabilities on supersedeas.
4. Statutory damages.

1. In general.

The filing of a \$500 cost bond by a party appealing to the Supreme Court of Mississippi from a decree confirming a municipal ordinance extending the city limits does not operate as a supersedeas where, following an unsuccessful appeal to that court, the appellant filed a petition for certiorari in the Supreme Court of the United States. *Bridges v. Biloxi*, 253 Miss. 812, 178 So. 2d 683, 180 So. 2d 154, 180 So. 2d 641, 1965 Miss. LEXIS 1054, 1965 Miss. LEXIS 1055, 1965 Miss. LEXIS 1056 (Miss. 1965).

Code 1942, § 1162 and this section [Code 1942, § 1163], which deal with appeal bonds generally in civil cases, were inapplicable to an appeal bond given on an appeal from a judgment of civil contempt. *Bryant v. Associates Discount Corp.*, 251 Miss. 1, 167 So. 2d 657, 1964 Miss. LEXIS 321 (Miss. 1964).

Supersedeas in civil cases under this section [Code 1942, § 1163] is a matter of right only where there is a money decree or judgment, or where there is a decree or judgment for the recovery or against the retention of specific property, or where the sale of or delivery of possession of real estate is directed. *Walton v. Tupelo*, 241 Miss. 894, 133 So. 2d 531, 1961 Miss. LEXIS 418 (Miss. 1961).

This section [Code 1942, § 1163] did not have any application in an appeal in an

annexation proceeding. *Dodd v. Jackson*, 238 Miss. 372, 118 So. 2d 319, 1960 Miss. LEXIS 417 (Miss. 1960).

Since the denial to an electric power distributing company of a decree, enjoining a municipality and rural cooperative from proceeding further in establishing a competitive electrical power distribution system in the municipality, was not a money decree, was not for the recovery or against a retention of specific property, nor directed the sale of property, the electric power distributing company was not entitled to a supersedeas as a matter of right. *Mississippi Power & Light Co. v. Coldwater*, 234 Miss. 640, 99 So. 2d 443, 1958 Miss. LEXIS 535 (Miss.), modified, 234 Miss. 615, 99 So. 2d 443, 1958 Miss. LEXIS 564 (Miss. 1958).

The dismissal of an appeal for failure to file the appeal bond within the required time is a breach of the conditions of the appeal bond so as to render the sureties liable. *Davidson v. Hunsicker*, 224 Miss. 203, 80 So. 2d 834, 1955 Miss. LEXIS 480 (Miss. 1955).

Code 1942, § 1970, permitting motion to discharge supersedeas in appeal to Supreme Court before appeal is returnable, is not applicable in case arising under this section [Code 1942, § 1163], which unquestionably grants right to appeal with supersedeas. *Coulter v. Banks*, 38 So. 2d 696 (Miss. 1949).

This section [Code 1942, § 1163] is not applicable to an appeal from an order issuing a writ of mandamus to compel a circuit clerk to permit a candidate to examine the ballot boxes after a primary election as provided by the Corrupt Practices Act, so as to allow an appeal with supersedeas as of right. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

Appeals to the Supreme Court with supersedeas in civil cases are matters of right only under this section and §§ 31 and 33, Code of 1930 (Code 1942, §§ 1165, 1167), and then only in three classes of cases: (1) Where there is a money decree or judgment, or (2) where there is a decree or judgment for the recovery or against the retention of specific property, or (3) where the decree directs the sale or delivery of possession of real estate, in which

cases a supersedeas is allowed as a matter of right when an approved supersedeas bond in double the amount or value is given, provided, of course, the decree or judgment is final in its nature or effect. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

Where the chancery court, having found that the plaintiff had an interest in certain oil and gas leases, appointed a master, who was directed to state an account of the income and profits from the operation theretofore conducted under the leases, and of expenditures appropriately made to develop the property, and to report to the court his findings as to the rights of the parties under the accounting and for proper hearing and further decree thereon, and, to settle controlling principles and to avoid delay and expense, directed that an appeal should be granted to the Supreme Court, the chancery court, in undertaking to fix the value of the interest of the plaintiff, did so only for the purpose of determining the amount of the appeal bond to be furnished, and not as a final decree which would preclude further consideration of such value. *Sample v. Romine*, 193 Miss. 706, 10 So. 2d 346, 8 So. 2d 257, 1942 Miss. LEXIS 104 (Miss. 1942).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving bond for appeal to the supreme court. *Sabougla Drainage Dist. v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219, 2 So. 2d 573, 1941 Miss. LEXIS 109 (Miss. 1941).

To operate as supersedeas, one of conditions of bond must be that appellant will satisfy judgment or decree complained of. *Spiro v. Shapleigh Hardware Co.*, 153 Miss. 195, 119 So. 206, 1928 Miss. LEXIS 191 (Miss. 1928).

Where condition of bond was to pay Supreme Court's judgment and all costs, it could not operate as supersedeas. *Spiro v. Shapleigh Hardware Co.*, 153 Miss. 195, 119 So. 206, 1928 Miss. LEXIS 191 (Miss. 1928).

If supersedeas does not on compliance with Code 1906 § 50, as matter of right, follow an appeal from a final decree, a

judge of the Supreme Court may grant it under § 56 [Code 1942, § 1169]. *Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152, 1914 Miss. LEXIS 255 (Miss. 1914).

Appeals with and without supersedeas have the same effect except that the former operate to stay execution. *Yazoo & M. V. R. Co. v. Adams*, 78 Miss. 977, 30 So. 44, 1901 Miss. LEXIS 152 (Miss. 1901).

2. Bond on supersedeas.

Chancery court did not err in denying a county board of supervisors a supersedeas bond because nothing in the judgment awarded anything to anyone, it merely validated bonds; the chancery court reviewed the evidence of costs submitted by the board and also took note of the hardship that would cause to the objectors. *Lauderdale Cnty. v. Lauderdale Cnty. Bd. of Supervisors*, 172 So. 3d 714, 2015 Miss. LEXIS 432 (Miss. 2015).

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' supersedeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment when he approved the bonds, he and the county were immune from liability. *Newton County v. State ex rel. Dukes*, 133 So. 3d 819, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 8 (Miss. 2014), aff'd in part and rev'd in part, 133 So. 3d 805, 2014 Miss. LEXIS 143 (Miss. 2014).

The amount of a supersedeas bond should be sufficient to protect the appellee in his or her judgment and, therefore, it should ensure the payment of the judgment and interest, and any waste that could occur pending the appeal. If the appeal is affirmed, the appellee should be able to satisfy the payment of the judgment in full, together with costs, interests, and the damages for delay. The bond is the typical means of giving the appellees security. However, the court may approve security in the form of cash or property. The judgment may be secured in other ways such as the court's taking possession of personal property or otherwise providing for a method to ensure payment of the appellee's judgment. The controlling guideline in determination of form,

amount, and procedure for supersedeas bonds is Mississippi Supreme Court Rule 8, effective January 1, 1988 which governs all proceedings in appeals and other proceedings subsequently brought. *Perkins v. Thompson*, 539 So. 2d 1029 (Miss. 1989).

Since appellant's filing of two appeal bonds totaling 125 per cent of the judgment appealed from, under which different sureties bound themselves for a stated portion of the required supersedeas bond, was not a sufficient compliance with Code 1942, §§ 1163 and 1973, appellee's exceptions to the sufficiency of the bonds would be sustained, unless within 30 days appellant filed a good and sufficient supersedeas bond. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

A supersedeas bond signed by only one individual surety is defective. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

The requirement as to the amount of a supersedeas bond is not met by giving bonds with different sureties for varying amounts aggregating the required amount. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419, 1959 Miss. LEXIS 299 (Miss. 1959).

The NAACP, against whom a judgment was entered in a protracted state anti-trust action arising from civil rights activities, was denied due process of law and was entitled to a preliminary injunction against the enforcement of § 11-51-31 where state remedies with respect to the bond provisions had been exhausted, where the prevailing parties at trial were not required to give security for any loss or damage which might be sustained should the trial court's judgment be set aside on appeal, where the parties prevailing at trial would not be substantially harmed by granting the injunctive relief and where, if injunctive relief were not granted, the NAACP's rights of free speech and association would be severely impaired and the NAACP would suffer immediate and irreparable harm to its projects and programs. *Henry v. First Nat'l Bank*, 424 F. Supp. 633, 1976 U.S. Dist. LEXIS 12672 (N.D. Miss. 1976), aff'd, 595 F.2d 291, 1979 U.S. App. LEXIS 14550 (5th Cir. Miss. 1979).

Where the value of appellee's net interest, including the money decree and the value of the property in controversy, less the amount awarded to appellants on their cross-bill, was \$13,225, an appeal bond in the penal sum of \$593.75 was for an insufficient amount, and the supersedeas would be ordered discharged unless, within 10 days, an adequate bond should be given and approved. *Horton v. Boatright*, 234 Miss. 446, 105 So. 2d 567, 1958 Miss. LEXIS 515 (Miss. 1958).

In an arbitration proceeding where an award has been entered almost two years earlier and which was subsequently affirmed, the chancery court had authority to correct the decree and where supersedeas bond had been overlooked in declaring a decree, the chancery court could include finding of liability to cost claimants against the supersedeas bond given by surety in connection with prior interlocutory appeal which had been dismissed. *Fidelity & Casualty Co. v. State Bldg. Com.*, 228 Miss. 37, 87 So. 2d 449, 1956 Miss. LEXIS 485 (Miss. 1956).

On appeal by the defendants from an adverse decree in a suit by the owners of one-fourth of the stock of a corporation to have the corporation dissolved and the proceeds distributed, a supersedeas bond in double the par value of the stock of the complainants, rather than a bond in double the amount of the entire capital stock of the corporation, would be required. *Hyman Mercantile Co. v. Kiersky*, 192 Miss. 195, 192 Miss. 201, 4 So. 2d 881, 198 So. 574, 1940 Miss. LEXIS 1 (Miss. 1940).

On appeal from order granting injunction, if the bond required by the supersedeas decree is deemed insufficient and a motion filed to increase the bond, the facts showing the insufficiency of the bond must be set forth in the motion. *McNeeley v. Natchez*, 139 Miss. 628, 102 So. 564, 1925 Miss. LEXIS 107 (Miss. 1925).

Bond in double the amount of decree is required for supersedeas except where impounded funds are separately decreed to be turned over. Surety companies are qualified bondsmen. *Aetna Ins. Co. v. Robertson*, 127 Miss. 440, 90 So. 120, 1921 Miss. LEXIS 244 (Miss. 1921).

Where appellant executed appeal bond which is insufficient as a supersedeas un-

der § 50, Code 1906, a motion to require a larger penalty will be overruled. *McCrory v. Donald*, 118 Miss. 596, 79 So. 801, 1918 Miss. LEXIS 101 (Miss. 1918).

If in a suit to restrain proceedings under an act of the Legislature, the chancery court dissolve the injunction, award damages against complainants and dismiss the bill, and the complainants obtain a supersedeas appeal under Code 1892, § 49, the Supreme Court on motion of appellees will discharge the supersedeas as to the dissolution of the injunction, but will continue it until the final hearing as to the decrees dismissing the suit and adjudging the act constitutional. *Ross v. Quick*, 89 Miss. 29, 42 So. 281, 1906 Miss. LEXIS 25 (Miss. 1906).

Bond with but one personal surety is insufficient. *Pfiefer & Dreyfus v. Hartman*, 60 Miss. 505, 1882 Miss. LEXIS 90 (Miss. 1882).

3. Rights and liabilities on supersedeas.

Sureties on husband's supersedeas bond, staying enforcement pending appeal of decree granting wife divorce and establishing her title to the home, whereby husband was enabled to occupy part of the property and collect rent upon the remainder, were liable in a suit for an accounting for such rent due by the husband for his occupancy and for the amounts collected by him from the other tenants during the pendency of appeal. *Hemphill v. Hemphill*, 199 Miss. 428, 24 So. 2d 855, 1946 Miss. LEXIS 213 (Miss. 1946).

Where a surety appealed from a judgment against it and its principal executed an appeal bond providing that the surety should satisfy the judgment or decree complained of and also such final judgment or decree as might be made in the cause and all costs if the same should be affirmed, the surety was not liable for the judgment rendered in the court below by reason of such appeal bond where the judgment as to it was reversed on appeal. *United States Fidelity & Guaranty Co. v. Rice*, 184 Miss. 443, 185 So. 563, 186 So. 620, 1939 Miss. LEXIS 25 (Miss. 1939).

Authority of a court to make orders for the preservation of property in the hands of a receiver is not impaired by an appeal

with supersedeas from the final decree. *Lamb v. Rowan*, 81 Miss. 369, 33 So. 4, 1902 Miss. LEXIS 146 (Miss. 1902).

Actions on supersedeas and injunction bonds are not maintainable until the final disposition of the case in which they were given. *Yazoo & M. V. R. Co. v. Adams*, 78 Miss. 977, 30 So. 44, 1901 Miss. LEXIS 152 (Miss. 1901).

Where pending an appeal with supersedeas, the bond not having been executed until nearly four months after date of judgment, and the sheriff not having been served with the writ of supersedeas or received other official notification of it, he is not liable on his bond for permitting a successful claimant to take property that had been adjudged to him. *Memphis Grocery Co. v. Anderson*, 76 Miss. 322, 24 So. 387, 1898 Miss. LEXIS 87 (Miss. 1898).

By executing bond to supersede a decree in chancery the sureties subject themselves to the jurisdiction of the court to enforce the decree and it may render a decree against them on the bond. *Kiernan*

v. Cameron, 66 Miss. 442, 6 So. 206, 1889 Miss. LEXIS 124 (Miss. 1889).

4. Statutory damages.

The amount of the supersedeas bond is not conclusive of the basis upon which the 5% damages of a successful appellee is to be computed. *Sunflower Farms, Inc. v. McLean*, 238 Miss. 168, 117 So. 2d 808, 1960 Miss. LEXIS 393 (Miss. 1960).

Where an appeal was dismissed because of the appellant's failure to file an appeal bond within the required time, under Code 1942, § 1973 statutory damages will be allowed. *Davidson v. Hunsicker*, 224 Miss. 203, 80 So. 2d 834, 1955 Miss. LEXIS 480 (Miss. 1955).

Notwithstanding granting of appeal with supersedeas to settle principles of the case on dissolution of an injunction to restrain a sale under a trust deed, statutory damages should be allowed. *Burns v. Dreyfus*, 69 Miss. 211, 11 So. 107, 1891 Miss. LEXIS 93 (Miss. 1891).

RESEARCH REFERENCES

ALR.

Validity and construction of state statutory provision forbidding court to stay, pending review, judgment or order revoking or suspending professional, trade, or occupational license. 42 A.L.R.4th 516.

Am. Jur.

4 Am. Jur. 2d (Rev), Appellate Review §§ 292, 294.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal

and Error, Form 461.1 (notice – motion for order dispensing with or limiting security); Form 491.1 (notice – motion for order that security is insufficient).

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 295, 296.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-33. Parties and sureties on bonds examined on oath.

To enable the clerk to determine the value or amount of the matter in controversy, or the value of rents, where the same shall not appear by the proceedings in the cause, he may examine the parties and other persons, on oath. He may also examine, on oath, all persons who may be offered as sureties on any supersedeas bond, touching their sufficiency as such sureties, and require the examination to be put in writing and signed by such persons.

HISTORY: Codes, 1857, ch. 62, art. 106; 1871, § 1253; 1880, § 2343; 1892, § 50; 1906, § 51; Hemingway's 1917, § 27; 1930, § 30; 1942, § 1164; Laws, 1978, ch. 335, § 18, eff from and after July 1, 1978.

Cross References — Power of clerk to administer oaths, see § 11-1-1.

RESEARCH REFERENCES

ALR.

Counterclaim, etc. as affecting appellate jurisdictional amount. 58 A.L.R.2d 84.

Jurisdictional amount for appellate review as affected by payment, tender, or settlement. 58 A.L.R.2d 166.

Jurisdictional amount for appellate review as affected by abandonment of claim, wholly or in part. 58 A.L.R.2d 177.

Perjury or false swearing as contempt. 89 A.L.R.2d 1258.

Am. Jur.

5 Am. Jur. 2d Appellate Review §§ 387,393, 394.

CJS.

4A C.J.S., Appeal and Error §§ 339, 342.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-35. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 61, art. 1 (88); 1857, ch. 55, art. 19; 1871, § 1556; 1880, § 2326; 1892, § 51; 1906, § 52; Hemingway's 1917, § 28; 1930, § 31; 1942, § 1165; Am Laws, 1978, ch. 335, § 19]

Editor's Notes — Former § 11-51-35 related to bond to supersede writ of possession.

§ 11-51-37. Judgment on bond to supersede writ of possession.

If the judgment or decree as to the land embraced in the stay of execution obtained under Section 11-51-35 shall be affirmed, the court below, on the receipt of the certificate of the affirmance, shall, after the obligors in the supersedeas bond have been summoned, proceed to inquire, as well of the value of the use and occupation of said land as of the damages by any waste or injury contemplated by the bond. Judgment for the sums assessed shall be rendered against the obligors in the bond, or such as are alive; and if any be dead, like proceedings in all respects may be had as are provided for in other cases of deceased obligors in bonds given in legal proceedings.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 1(88); 1857, ch. 55, art. 19; 1871, § 1556; 1880, § 2327; 1892, § 52; 1906, § 53; Hemingway's 1917, § 29; 1930, § 32; 1942, § 1166; Laws, 1978, ch. 335, § 20, eff from and after July 1, 1978.

Editor's Notes — Section 11-51-35 referred to in this section was repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

This section is modified or supplanted by Rule 8, Miss. R. App. P. as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

Cross References — Proceedings on death of surety on bonds, see §§ 11-1-29 to 11-1-35.

Judgment on appeal bonds generally, see §§ 11-3-27 to 11-3-33.

Proceedings upon affirmance of judgment in ejectment when crop is growing on land, see §§ 11-19-91, 11-19-93.

JUDICIAL DECISIONS

1. In general.

Neither Code 1942, § 1165 nor this section [Code 1942, § 1166] has any application to an appeal by tenant from judgment rendered in proceeding against him as a holdover tenant, awarding appellee recovery of land as against contention that tenant was in possession under contract for purchase, since this is not an appeal from judgment in an action of ejectment with a stay of execution. *Hodges v. Jones*, 197 Miss. 107, 19 So. 2d 917, 1944 Miss. LEXIS 279 (Miss. 1944).

Plaintiff's cause of action on defendant's appeal bond stipulating that if the judgment, awarding plaintiff possession of

land under statute (Code 1942, § 948) providing for proceedings against tenant holding over, as against defendant's contention that he was in possession under contract of purchase, should be affirmed, defendant would pay all costs and the value of the use and occupation of the land after the time of taking the appeal, as well as damages for waste or injury, is enforceable, upon affirmance of the judgment, only by an original action on the bond and not merely by remanding the cause to the court below for the ascertainment of the amount of damages covered by the bond. *Hodges v. Jones*, 197 Miss. 107, 19 So. 2d 917, 1944 Miss. LEXIS 279 (Miss. 1944).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 393, 394, 387.

CJS.

5 C.J.S., Appeal and Error §§ 1182, 1223-1233.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-39. Requirements of supersedeas bond where judgment appealed from directs sale or delivery of possession of real estate.

If the judgment appealed from directs the sale or the delivery of possession of real estate, the supersedeas bond shall be conditioned to pay all damages, and not to commit or suffer to be committed any waste thereon, and to pay the value of the use and occupation thereof until the delivery of possession, in case the possession is to be surrendered, if the judgment appealed from shall be affirmed. In such case, the chancery court, when the cause shall be remanded, shall ascertain the value of the use and occupation and of any waste committed and the damages, and shall render such judgment therefor against the obligors in the supersedeas bond, or the representatives of any who have died, as may be necessary to secure the rights of the party entitled to such judgment. A judgment for the sums assessed shall be rendered against the obligors in the bond or such as are alive; and if any be dead, like proceedings may be had in all respects as provided for in other cases of deceased obligors in bonds given in legal proceedings.

HISTORY: Codes, 1880, § 2328; 1892, § 53; 1906, § 54; Hemingway's 1917, § 30; 1930, § 33; 1942, § 1167; Laws, 1978, ch. 335, § 21; Laws, 1991, ch. 573, § 85, eff from and after July 1, 1991.

Editor's Notes — This section is modified or supplanted by Miss. R. App. P. 8, as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

Cross References — Proceedings on death of surety on bond, see §§ 11-1-29 to 11-1-35.

Sale of land under decree, see §§ 11-5-93 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Bond on real property judgment.

1. In general.

Supersedeas in civil cases under this section [Code 1942, § 1167] is a matter of right only where there is a money decree or judgment, or where there is a decree or judgment for the recovery or against the retention of specific property, or where the sale of or delivery of possession of real estate is directed. *Walton v. Tupelo*, 241 Miss. 894, 133 So. 2d 531, 1961 Miss. LEXIS 418 (Miss. 1961).

Since denial to an electric power distributing company of a decree enjoining a municipality and rural cooperative from proceeding further in establishing a competitive electrical power distribution system in the municipality, was not a money decree, was not for the recovery or against a retention of specific property, nor directed the sale of property, the electric power distributing company was not entitled to a supersedeas as a matter of right. *Mississippi Power & Light Co. v. Coldwater*, 234 Miss. 640, 99 So. 2d 443, 1958 Miss. LEXIS 535 (Miss.), modified, 234 Miss. 615, 99 So. 2d 443, 1958 Miss. LEXIS 564 (Miss. 1958).

Since Code 1942, § 1165, was inapplicable, to an appeal from the chancellor's action in refusing to quash an alias writ of possession instituted at the instance of a party who had previously been adjudicated to have the title to and possession of the land in question, a bond conditioned thereon was improper. The bond should have been conditioned upon this section [Code 1942, § 1167]. *Melvin v. Parker*, 231 Miss. 844, 95 So. 2d 790, 1957 Miss. LEXIS 571 (Miss. 1957).

This section [Code 1942, § 1167] is not applicable to an appeal from an order issuing a writ of mandamus to compel a

circuit clerk to permit a candidate to examine the ballot boxes after a primary election as provided by the Corrupt Practices Act, so as to allow an appeal with supersedeas as of right. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

Appeals to the Supreme Court with supersedeas in civil cases are matters of right only under this section [Code 1942, § 1167] and §§ 29 and 31, Code of 1930 (Code 1942, §§ 1163, 1165) and then only in three classes of cases: (1) Where there is a money decree or judgment, or (2) where there is a decree or judgment for the recovery or against the retention of specific property, or (3) where the decree directs the sale or delivery of possession of real estate, in which cases a supersedeas is allowed as a matter of right when an approved supersedeas bond in double the amount or value is given, provided, of course, the decree or judgment is final in its nature or effect. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

Where court decrees sale of real estate to satisfy lien established by the court, to obtain an appeal with supersedeas, a bond is required in double the value of the property ordered sold, or in double the judgment rendered against the property, taking whichever is the smallest as a basis for the bond. *Beekman v. Bost*, 125 Miss. 77, 86 So. 713, 1921 Miss. LEXIS 91 (Miss. 1921).

Where appellant executed bond which is insufficient as a supersedeas under Code 1906, § 54, a motion to increase penalty will be overruled. *McCrory v. Donald*, 118 Miss. 596, 79 So. 801, 1918 Miss. LEXIS 101 (Miss. 1918).

2. Bond on real property judgment.

Trial court did not err in awarding each party 50 percent of marital assets where the husband maintained the farms and

helped wife through medical school, which gave her a higher income, but the trial court erred in determining the amount of the supersedeas bond because the bond on the money judgment awarded to the husband should have been set in accordance with Miss. R. App. P. 8, and the bond on

the farm awarded to the husband should have been set according to Miss. Code Ann. § 11-51-39. *Deal v. Wilson*, 922 So. 2d 24, 2005 Miss. App. LEXIS 475 (Miss. Ct. App. 2005), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 127 (Miss. 2006).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 393, 394, 387.

Undertaking to stay judgment directing sale or delivery of possession of real property, 2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 233, 234.

CJS.

5B C.J.S., Appeal and Error §§ 1018, 1065-1075.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-41. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2331; 1892, § 56; 1906, § 57; Hemingway's 1917, § 33; 1930, § 36; 1942, § 1170]

Editor's Notes — Former § 11-51-41 related to supersedeas as to decree fixing specific charge on real estate.

§ 11-51-43. Supersedeas in cases not provided for.

In any case of an appeal to the Supreme Court, where no special provision is made by law for a supersedeas of the judgment or decree appealed from, or for the bond to be given in such case, a supersedeas may be allowed by the court rendering the judgment or decree appealed from or by the judge thereof, or by the supreme court or any of the judges of said court, upon such bond, with such sureties as said court or judge may direct in the order for a supersedeas.

HISTORY: Codes, 1880, § 2330; 1892, § 55; 1906, § 56; Hemingway's 1917, § 32; 1930, § 35; 1942, § 1169.

Editor's Notes — This section is modified or supplanted by Rule 8, Miss. R. App. P. as indicated in Appendix II, Statutes Modified or Supplanted, to those Rules.

Cross References — Exception to sufficiency of bond for supersedeas, see § 11-3-33.

JUDICIAL DECISIONS

ANALYSIS

1. Allowance of writ.
2. Matters covered.

3. Bond required.

1. Allowance of writ.

Appellant's Motion for Stay of Execu-

tion and Motion for Leave to Appeal Without Supersedeas Bond did not toll the time allowed for appeal by Code 1972, § 11-51-5 [Repealed]; When it became apparent that no ruling would be had on the appellant's motions within the 45 day period, the appellant was required to post a cost bond as provided by Code 1972, § 11-51-29 within the 45 day period, and he could then have filed a motion to the Supreme Court for supersedeas as provided for in Code 1972, § 11-51-43. *Summer v. Henn*, 323 So. 2d 751, 1975 Miss. LEXIS 1575 (Miss. 1975).

Supersedeas is in the discretion of the court on appeal from a decree granting an injunction. *Walton v. Tupelo*, 241 Miss. 894, 133 So. 2d 531, 1961 Miss. LEXIS 418 (Miss. 1961).

In a proceeding by an electric power distributing company to enjoin a municipality and rural cooperative from proceeding further in establishing a competitive electric power distributing system, a decree that the complainant "take nothing" was a self-executing decree for which no process was required, and, since there was nothing upon which a supersedeas could operate, the writ would not issue. *Mississippi Power & Light Co. v. Coldwater*, 234 Miss. 640, 99 So. 2d 443, 1958 Miss. LEXIS 535 (Miss.), modified, 234 Miss. 615, 99 So. 2d 443, 1958 Miss. LEXIS 564 (Miss. 1958).

Under this section [Code 1942, § 1169] whether a supersedeas shall be allowed is within the sound discretion of the court. *Orkin Exterminating Co. v. Posey*, 218 Miss. 611, 67 So. 2d 526, 1953 Miss. LEXIS 577 (Miss. 1953).

Where the chancellor heard the evidence and denied request for appeal with supersedeas, and that evidence was not before the supreme court, the court was in no position to say that this action of the chancellor constituted an abuse of sound discretion vested in him and accordingly would deny petition filed in supreme court by supersedeas. *Orkin Exterminating Co. v. Posey*, 218 Miss. 611, 67 So. 2d 526, 1953 Miss. LEXIS 577 (Miss. 1953).

This section [Code 1942, § 1169], governs appeals to the Supreme Court with supersedeas from final decrees or judgments in all civil cases other than those

mentioned in Code 1942, §§ 1163, 1165, and 1167, and allowance thereof is within the sound discretion of the court. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

Allowance of appeal with supersedeas from writ of mandamus ordering circuit clerk to permit candidate to examine ballot boxes after primary election as provided by the Corrupt Practices Act was an abuse of discretion, where such allowance had the practical effect of denying the writ so far as affording any relief before the day of the general election, and it appeared on review that the appeal was without merit and instituted for the purpose of delay. *Sartin v. Barlow*, 196 Miss. 159, 16 So. 2d 372, 1944 Miss. LEXIS 175 (Miss. 1944).

If supersedeas does not, on compliance with Code 1906 § 50 (Code 1942, § 1163), as matter of right, follow an appeal from a final decree, a judge of the Supreme Court can grant it under this section (Code 1906, § 56). *Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152, 1914 Miss. LEXIS 255 (Miss. 1914).

2. Matters covered.

Affirmative injunctive relief, denied the appellant by the lower court, may not be granted by the Supreme Court under the guise of a writ of supersedeas. *Mississippi Power & Light Co. v. Coldwater*, 234 Miss. 640, 99 So. 2d 443, 1958 Miss. LEXIS 535 (Miss.), modified, 234 Miss. 615, 99 So. 2d 443, 1958 Miss. LEXIS 564 (Miss. 1958).

A supersedeas or stay will not be granted by either the lower or the appellate court where it would result in irreparable or disproportionate injury to the appellee, or where the damage which may result from it cannot be compensated for in money, so that the appellee will not be protected by the bond in case of affirmance. *Orkin Exterminating Co. v. Posey*, 218 Miss. 611, 67 So. 2d 526, 1953 Miss. LEXIS 577 (Miss. 1953).

On motion for a supersedeas in cause appealed thereto, the Supreme Court will not pass on matters litigated further than is necessary to determine the motion. *Alabama & V. R. Co. v. Jackson & E. R. Co.*, 129 Miss. 437, 91 So. 902, 1922 Miss. LEXIS 34 (Miss. 1922).

3. Bond required.

On appeal by the defendants from an adverse decree in a suit by the owners of one-fourth of the stock of a corporation to have the corporation dissolved and the proceeds distributed, a supersedeas bond in double the par value of the stock of the complainants, rather than a bond in double the amount of the entire capital stock of the corporation, would be required. *Hyman Mercantile Co. v. Kiersky*,

192 Miss. 195, 192 Miss. 201, 4 So. 2d 881, 198 So. 574, 1940 Miss. LEXIS 1 (Miss. 1940).

Supersedeas may be granted upon giving bond for costs, interest and damages where a money decree is separable in ordering payment of impounded funds in a suit for penalty for violating anti-trust law. *Aetna Ins. Co. v. Robertson*, 127 Miss. 440, 90 So. 120, 1921 Miss. LEXIS 244 (Miss. 1921).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 393, 394 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 241.1 (application for stay of execution pending appeal).

CJS.

5B C.J.S., Appeal and Error §§ 1018-1094.

§ 11-51-45. When bond made payable to state.

In all cases not specially provided for, the supersedeas bond may be made payable to the state. Where it is provided that such bond shall be made payable to the opposite party, it shall not be an objection to the bond that it is not payable to the proper person, but such bond shall be valid and binding on the obligors, and may be proceeded on in all respects as if it were payable as directed by law.

HISTORY: Codes, 1880, § 2329; 1892, § 54; 1906, § 55; *Hemingway's* 1917, § 31; 1930, § 34; 1942, § 1168; Laws, 1978, ch. 335, § 22, eff from and after July 1, 1978.

Cross References — General effect of defect in bond, see § 11-3-5.

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 387- 397.

CJS.

5 C.J.S., Appeal and Error §§ 1182-1187, 1191-1193.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-47. Supersedeas bond signed by one appellant sufficient.

Supersedeas bonds shall be sufficient if signed by one or more of several appellants, with sureties as required by law, and in case of the affirmance of the decree or judgment complained of, the judgment of affirmance shall be entered against all the appellants in the same manner as if all had signed such

bond; but if the decree or judgment be affirmed as to some and reversed as to others of said appellants, the judgment of affirmance shall be entered only against those as to whom it is affirmed, and the sureties on the bond.

HISTORY: Codes, 1857, ch. 62, art. 111; 1871, § 1261; 1880, § 2332; 1892, § 57; 1906, § 58; Hemingway's 1917, § 34; 1930, § 37; 1942, § 1171; Laws, 1978, ch. 335, § 23, eff from and after July 1, 1978.

Cross References — Circuit court restrictions on who may sign bonds, see Miss. Uniform Circuit and County Court Rule 1.07.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Defects in bond.
3. Liability on bond.

1. In general.

Defendant who did not sign appeal bond held estopped, after decision, from setting up want of authority in his attorney to authorize appeal where petition for appeal was filed jointly and severally by defendants and was signed by attorney who represented each of them in trial court. *Great Atlantic & Pacific Tea Co. v. Majure*, 176 Miss. 378, 168 So. 468 (Miss. 1936).

It is unnecessary for all the appellants who unite in the appeal to execute the bond. *Hudson v. Gray*, 58 Miss. 589, 1881 Miss. LEXIS 3 (Miss. 1881); *Avent v. Markette*, 109 Miss. 835, 69 So. 705, 1915 Miss. LEXIS 231 (Miss. 1915).

2. Defects in bond.

Where appeal bond executed by surety and signed by one defendant recited that both defendants were appellants and record came before Supreme Court in regular form with appeal bond operating as a supersedeas and court's attention was not directed to any defects therein, surety held estopped to rely on any defects in proceedings or to assert that defendant who did not sign bond did not authorize appeal. *Great Atlantic & Pacific Tea Co. v. Majure*, 176 Miss. 378, 168 So. 468 (Miss. 1936).

Sureties on appeal bonds, make themselves parties to appeal and answerable to appellee respecting all liability thereon;

hence must ascertain before bonds are signed and approved who are appellants therein. *Great Atlantic & Pacific Tea Co. v. Majure*, 176 Miss. 378, 168 So. 468 (Miss. 1936).

After appeal has been granted and cause removed by approval of the appeal bond, the chancellor has lost jurisdiction to reform the bond. *Avent v. Markette*, 109 Miss. 835, 69 So. 705, 1915 Miss. LEXIS 231 (Miss. 1915).

Appeal bond will not be stricken and appeal dismissed because names of some of principals were inserted without authority. *Avent v. Markette*, 109 Miss. 835, 69 So. 705, 1915 Miss. LEXIS 231 (Miss. 1915).

Where on motion to dismiss appeal appellant's counsel admits defect in the appeal bond and requests leave to file a bond, such leave will be granted. *Wills v. Howie Bros.*, 109 Miss. 568, 68 So. 780, 1915 Miss. LEXIS 194 (Miss. 1915).

3. Liability on bond.

Where judgment is rendered against two or more persons from which an appeal with supersedeas is taken and the judgment is reversed as to one and affirmed as to the other or others, the appellee as to whom the case is reversed is not liable on the supersedeas bond but the sureties are liable thereon. *Wise v. Cobb*, 135 Miss. 673, 100 So. 189, 1924 Miss. LEXIS 58 (Miss. 1924).

If appellants execute a joint supersedeas bond and the judgment be reversed as to some and affirmed as to others, the court will render judgment against the sureties. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229, 1889 Miss. LEXIS 113 (Miss. 1889).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review
§§ 387- 397.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719,
December 1979.

CJS.

5 C.J.S., Appeal and Error §§ 1191-
1193.

§ 11-51-49. Bonds by corporations.

Appeal bonds may be executed by a corporation by its authorized agent or attorney, in the name of the corporation, without affixing its corporate seal, and such bond, when so executed by the attorney of record of a corporation, shall be held and conclusively presumed to have been executed by the authority of such corporation.

HISTORY: Codes, 1892, § 58; 1906, § 59; Hemingway's 1917, § 35; 1930, § 38; 1942, § 1172; Laws, 1888, p. 92.

Cross References — Corporate instrumentalities of United States government appealing without bond, see § 11-51-101.

RESEARCH REFERENCES

CJS.

5B C.J.S., Appeal and Error §§ 1034-
1037.

§§ 11-51-51 through 11-51-55. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-51. [Codes, 1892, § 59; 1906, § 60; Hemingway's 1917, § 36; 1930, § 39; 1942, § 1173; Am Laws, 1978, ch. 335, § 24]

§ 11-51-53. [Codes, 1892, § 60; 1906, § 61; Hemingway's 1917, § 37; 1930, § 40; 1942, § 1174; Am Laws, 1978, ch. 335, § 25]

§ 11-51-55. [Codes, Hutchinson's 1848, ch. 63, class IV, art. 1 (24); 1851; 1851, ch. 63, art. 29; 1871, § 431; 1880, § 2345; 1892, § 72; 1906, § 73; Hemingway's 1917, § 53; 1930, § 52; 1942, § 1186]

Editor's Notes — Former § 11-51-51 related to appeals to be granted and bonds approved by clerk.

Former § 11-51-53 related to bond to be given to perfect an appeal.

Former § 11-51-55 related service and return of summons in appeal.

§ 11-51-57. Appellee, nonresident or residence unknown.

When the appellee's residence is unknown, and he has no attorney in this state, notice of the appeal may be published in the manner provided for by the Mississippi Rules of Civil Procedure for service by publication upon such

persons, and the Supreme Court, being satisfied thereof, may hear and determine the appeal as if a summons had been duly served on the appellee.

HISTORY: Codes, Hutchinson's 1848, ch. 63, class IV, art. 3; 1857, ch. 63, art. 30; 1871, § 432; 1880, § 1420; 1892, § 73; 1906, § 74; Hemingway's 1917, § 54; 1930, § 53; 1942, § 1187; Laws, 1991, ch. 573, § 86, eff from and after July 1, 1991.

Cross References — Appeal as of right, how taken, see Miss. R. App. P. 3.
Filing and service, see Miss. R. App. P. 25.

RESEARCH REFERENCES

CJS. in civil case as violating equal protection clause of Federal Constitution's Fourteenth Amendment — Supreme Court cases. 100 L. Ed. 2d 947.
4 C.J.S., Appeal and Error §§ 472-476.

Lawyers' Edition. State regulation of appellate procedure

§ 11-51-59. Execution stayed by bond.

When an appeal shall be taken, and bond for stay of execution given, the clerk shall not issue execution on the judgment or decree appealed from until such stay shall end or be discharged. If execution had been issued before the bond for stay of execution was given, the clerk shall issue a command to the officer in whose hands the execution may be to desist from enforcing it, and to surrender any property seized under it to the person from whom it was taken or who may be entitled to it.

HISTORY: Codes, 1880, § 2346; 1892, § 74; 1906, § 75; Hemingway's 1917, § 55; 1930, § 54; 1942, § 1188.

Cross References — Judgments and executions generally, see § 9-7-91.
Motion to discharge supersedeas in appeal to Supreme Court, see § 11-3-21.
Bond required to stay proceedings at law, see § 11-13-3.
Time for issuance of executions on judgments and decrees, see § 13-3-109.

RESEARCH REFERENCES

Am. Jur. General forms for bond to stay execution, 2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Forms 211-223.
5 Am. Jur. 2d (Rev), Appellate Review §§ 257, 294, 340-342.
2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 241.1 (application for stay of execution pending appeal).

CJS. 4 C.J.S., Appeal and Error §§ 472-476.

§§ 11-51-61 and 11-51-63. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.
§ 11-51-61. [Codes, Hutchinson's 1848, ch. 63, art. 2 (151); 1857, ch. 62, art. 103; 1871, § 1255; 1880, § 2344; 1892, § 68; 1906, § 69; Hemingway's 1917, § 47; 1930, § 55; 1942, § 1189; Am Laws, 1978, ch. 335, § 26]

§ 11-51-63. [Codes, Hemingway's 1917, § 48; 1930, § 56; 1942, § 1190; Laws, 1914, ch. 209]

Editor's Notes — Former § 11-51-61 related to duty of clerk when appeal is taken. Former § 11-51-63 related to appeals to Supreme Court – records to be made in duplicate.

§ 11-51-65. Record on second appeal.

If a case be remanded by the Supreme Court to the court below, and afterwards an appeal be taken in the same case to the Supreme Court, it shall not be necessary for the appellant to cause to be filed in the Supreme Court a transcript of so much of the record as may be already on file in said court, but the transcript previously sent up, together with a transcript of the subsequent proceedings in the case in the court below, shall constitute the record for the case in the Supreme Court. In such case, if the appellant shall, in his application for appeal, signify his desire for the clerk to make out and certify only a transcript of such subsequent proceedings, the clerk shall act accordingly.

HISTORY: Codes, 1880, § 2347; 1892, § 75; 1906, § 76; Hemingway's 1917, § 56; 1930, § 57; 1942, § 1191.

JUDICIAL DECISIONS

1. In general.

Pleadings and replications already in Supreme Court on first appeal should be omitted from record on subsequent appeal. *Yazoo & M. V. R. Co. v. M. Levy & Sons*, 147 Miss. 211, 113 So. 325, 1927 Miss. LEXIS 345 (Miss. 1927).

Record on second appeal purporting to be full and complete is presumed so. *Gilbert v. Glenny*, 106 So. 517 (Miss. 1925).

Statute does not authorize court to con-

sider on second appeal evidence in record on first appeal in passing on sufficiency of that on second trial. *Gilbert v. Glenny*, 106 So. 517 (Miss. 1925).

The court on appeal from decree enjoining enforcement of a judgment cannot examine the record filed on an appeal in the action in which the judgment was obtained. *Hooks v. Alabama & V. R. Col*, 73 Miss. 145, 18 So. 925, 1895 Miss. LEXIS 113 (Miss. 1895).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 402- 409, 424- 430, 538.

CJS.

4 C.J.S., Appeal and Error §§ 554-687.

§ 11-51-67. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991. [Codes, 1942, § 1191.5; Laws, 1958, ch. 277, eff May 26, 1958]

Editor's Notes — Former § 11-51-67 related to appeal to supreme court without transcript of evidence.

§ 11-51-69. Prepayment for costs certified on transcript.

When prepayment for costs shall be made with a clerk, he shall certify the fact on the transcript of the record, and immediately pay the costs of the court reporter. When the case shall be determined, if costs be adjudged against the appellant, the clerk shall pay the remaining costs out of the money so deposited, and shall deliver the residue of the money, or all of it if costs be not adjudged against such party, to the party entitled to it; and for any failure thereof he shall be liable to be dealt with by the Supreme Court, or the court of which he is clerk, for a contempt.

HISTORY: Codes, 1880, § 2348; 1892, § 76; 1906, § 77; Hemingway's 1917, § 57; 1930, § 58; 1942, § 1192; Laws, 1978, ch. 335, § 27; Laws, 1979, ch. 482, § 2, eff from and after passage (approved April 18, 1979).

Cross References — Security for costs in civil action of habeas corpus, see § 11-43-47.

Deposit for costs in lieu of bond, see § 11-51-29.

Deposits for costs in criminal cases, see § 99-35-107.

JUDICIAL DECISIONS

1. In general.

Section 11-51-69 clearly contemplates that the court reporter will be paid after the transcript is completed, and not before; estimated fees should not be disbursed to court reporters, but rather, the actual cost of the transcript should be paid to the court reporter when the transcript is satisfactorily completed in compliance with the Mississippi Supreme Court Rules and filed with the trial court clerk. In re Southwest Mississippi Regional Medical Center, 593 So. 2d 44, 1992 Miss. LEXIS 51 (Miss. 1992).

Clerk's certificate showing merely aggregate amount of fees for making transcript and for other services did not autho-

rize taxation of costs therefor. McDonald v. Spence, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

Taxation of costs by clerk of Supreme Court based upon trial court's certificate which stated aggregate amount of fees for making transcript and for other services rather than itemizing the account to show amount of fee for transcript would be set aside except insofar as it taxed fee due clerk of Supreme Court, but with permission granted to clerk of trial court to file a proper certificate and without prejudice to appellant to move for retaxation of costs. McDonald v. Spence, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

RESEARCH REFERENCES

Am. Jur.

Deposit in lieu of bond, 2 Am. Jur. Pl & Pr Forms (Rev); Appeal and Error, Forms 381-388.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal And Error, Forms 561 et seq.

CJS.

4 C.J.S., Appeal and Error §§ 441, 442.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-71. Statement on transcript of payment of fee therefor.

The clerk shall make a statement on the transcript of the record sent to the Supreme Court that the amount of his fee for such transcript has been paid to him; and, if he shall not do this, the Clerk of the Supreme Court shall not be required to demand and receive the same prior to filing the appeal.

HISTORY: Codes, 1880, § 2349; 1892, § 77; 1906, § 78; Hemingway's 1917, § 58; 1930, § 59; 1942, § 1193; Laws, 1978, ch. 335, § 28, eff from and after July 1, 1978.

Cross References — Fees of clerks of chancery courts, see §§ 25-7-9, 25-7-13.
Fees of clerks of circuit courts, see §§ 25-7-9, 25-7-13.

JUDICIAL DECISIONS**1. In general.**

An item for transcribing court reporter's notes erroneously omitted by the chancery clerk from the transcript, upon the supposition that the fact that the reporter had been paid made inclusion improper, may be added by the Supreme

Court to the costs taxable against appellees, although the time for filing a motion to retax costs has expired. *Mississippi Power & Light Co. v. Coldwater*, 234 Miss. 640, 99 So. 2d 443, 1958 Miss. LEXIS 535 (Miss.), modified, 234 Miss. 615, 99 So. 2d 443, 1958 Miss. LEXIS 564 (Miss. 1958).

RESEARCH REFERENCES**Am. Jur.**

5 Am. Jur. 2d (Rev), Appellate Review §§ 794- 840.

view: Civil Procedure. 50 Miss. L. J. 719, December 1979.

Law Reviews.

1979 Mississippi Supreme Court Re-

§ 11-51-73. Provision as to sending up bond directory.

The provision that the clerk shall send up to the Supreme Court any bond taken is directory, and shall not preclude the rendition of judgment by the Supreme Court on a copy of such bond, but said court may give judgment on a copy of such bond as if the original were before it.

HISTORY: Codes, 1880, § 2350; 1892, § 78; 1906, § 79; Hemingway's 1917, § 59; 1930, § 60; 1942, § 1194; Laws, 1978, ch. 335, § 29, eff from and after July 1, 1978.

Cross References — Effect of defect in bond, see § 11-3-5.

RESEARCH REFERENCES**Am. Jur.**

5 Am. Jur. 2d (Rev), Appellate Review §§ 292, 294.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

CJS.

4 C.J.S., Appeal and Error §§ 519, 520, 531-545.

§ 11-51-75. Appeal to circuit court from decision of a local governing authority.

Any person aggrieved by a judgment or decision of the board of supervisors of a county, or the governing authority of a municipality, may appeal the judgment or decision to the circuit court of the county in which the board of supervisors is the governing body or in which the municipality is located. A written notice of appeal to the circuit court must be filed with the circuit clerk within ten (10) days from the date at which session of the board of supervisors or the governing authority of the municipality rendered the judgment or decision. Upon filing, a copy of the notice of appeal must be delivered to the president of the board of supervisors or to the mayor or city clerk of the municipality and, if applicable, to any party who was a petitioner before the board of supervisors or the governing authority of the municipality.

(a) The notice of appeal filed in the circuit court with the circuit clerk shall contain the following:

(i) The name of the county board of supervisors or the name of the municipality as the appellee. If applicable, any party who was a petitioner before the board of supervisors or the governing authority of the municipality shall be named as an appellee.

(ii) A succinct statement of the reasons, or grounds, for the appeal.

(iii) A written description or designation of record which includes all matters that the appellant desires to be made part of the record.

(iv) Appellant must also deliver a copy of the notice of appeal and a written designation of the record, along with a list of all documents or transcripts in appellant's possession, to the clerk of the board of supervisors or to the clerk of the municipality.

(b) An appellee has ten (10) days from the filing of the notice of appeal with the circuit clerk to designate any other items or matters that appellee believes should be included in the designated record.

(c) The clerk of the board of supervisors or the municipal clerk must assemble a complete record of the proceedings to include all writings, matters, items, documents, plats, maps and transcripts of proceedings that were part of the record and deliver the complete record to the circuit clerk within thirty (30) days after the filing of the notice of appeal with the circuit clerk. The clerk of the board of supervisors or the municipal clerk shall certify that the record is accurate and complete and contains all writings, matters, items, documents, plats, maps and transcripts of proceedings designated by appellant and appellee in their designations of record.

(d) The circuit court, as an appellate court, either in term time or in vacation, shall hear and determine the same on the record and shall affirm or reverse the judgment. The circuit court shall enter an order establishing a briefing schedule and a hearing date, if any, for the parties to appear and present oral argument. If the judgment is reversed, the circuit court shall render such judgment or decision as the board of supervisors or the governing authority of the municipality ought to have rendered, and certify

the same to the board of supervisors or the governing authority of the municipality. Costs shall be awarded as in other cases.

(e) No appeal to the circuit court shall be taken from any order of the board of supervisors or the governing authority of the municipality which authorizes the issuance or sale of bonds, but all objections to any matters relating to the issuance and sale of bonds shall be adjudicated and determined by the chancery court, in accordance with the provisions of Sections 31-13-5 through 31-13-11. And all rights of the parties shall be preserved and not foreclosed, for the hearing before the chancery court, or the chancellor in vacation.

HISTORY: Codes, Hutchinson's 1848, ch. 51, art. 5 (45, 46); 1857, ch. 59, art. 33; 1871, § 1383; 1880, § 2351; 1892, § 79; 1906, § 80; Hemingway's 1917, § 60; 1930, § 61; 1942, § 1195; Laws, 1940, ch. 245; Laws, 1955, Ex ch. 33; Laws, 1962, ch. 240, eff from and after passage (approved June 1, 1962); Laws, 2018, ch. 448, § 1, eff from and after July 1, 2018.

Editor's Notes — Laws of 2018, ch. 448, § 2, provides as follows:

“SECTION 2. This act shall take effect and be in force from and after July 1, 2018, but nothing in this act shall affect any appeal perfected before July 1, 2018.”

Amendment Notes — The 2018 amendment rewrote the first paragraph, which read: “Any person aggrieved by a judgment or decision of the board of supervisors, or municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision, and may embody the facts, judgment and decision in a bill of exceptions which shall be signed by the person acting as president of the board of supervisors or of the municipal authorities. The clerk thereof shall transmit the bill of exceptions to the circuit court at once, and the court shall either in term time or in vacation hear and determine the same on the case as presented by the bill of exceptions as an appellate court, and shall affirm or reverse the judgment. If the judgment be reversed, the circuit court shall render such judgment as the board or municipal authorities ought to have rendered, and certify the same to the board of supervisors or municipal authorities. Costs shall be awarded as in other cases. The board of supervisors or municipal authorities may employ counsel to defend such appeals, to be paid out of the county or municipal treasury. Any such appeal may be heard and determined in vacation in the discretion of the court on motion of either party and written notice for ten (10) days to the other party or parties or the attorney of record, and the hearing of same shall be held in the county where the suit is pending unless the judge in his order shall otherwise direct”; added (a) through (d); and designated the formerly undesignated last paragraph as (e), and therein, in the first sentence, deleted “Provided, however that” at the beginning, substituted “the governing authority of the municipality” for “municipal authorities,” deleted “both inclusive, of the Mississippi Code of 1972” from the end, and deleted the last sentence, which read: “Provided, further, nothing in this section shall affect pending litigation”; and made minor stylistic changes.

Cross References — Actions to recover past due income, inheritance, and privilege taxes, see § 7-5-55.

Bills of exceptions generally, see § 11-7-211.

Appeals from special court of eminent domain, see § 11-27-29.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

Presentation of claims against county, see § 19-13-23.

Appeal from decree on municipal incorporation, see § 21-1-21.

Appeal from decree of extension or contraction of municipal corporate boundaries, see

§ 21-1-37.

Right of appeal from municipal equalization of tax assessments, see § 21-33-39.

Right of appeal from action of municipality in assessing or collecting property taxes, see § 21-33-83.

Claimant against municipality having right of appeal, see § 21-39-11.

Right of appeal from determinations under Homestead Exemption Law, see § 27-33-35.

Appeal from action of board of supervisors in equalizing tax assessments, see §§ 27-35-119, 27-35-121.

Effect of appeal of tax assessment, see § 27-35-121.

Appeal from order of county board of education in abolition, alteration, or creation of school districts, see §§ 37-7-103 et seq.

Appeal of an order by the school board, see § 37-7-115.

Appeal from ordinance incorporating airport property into municipal boundaries, see § 61-9-7.

Appeal from decision of Board of Bar Admissions, see § 73-3-39.

Appeal from determination by municipal governing authorities of future power requirements of municipality, see § 77-5-707.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Rules of Civil Procedure.
3. Bill of exceptions in general.
4. —Signing bill of exceptions.
5. Appeal bond.
6. Persons entitled to appeal.
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8. Particular matters as appealable.
9. Questions presented for review.
10. Proceedings on appeal.
11. Disposition of appeal.
12. Other remedies.
13. Standing.
14. Jurisdiction.
15. Evidence.
16. Res judicata.

1. In general.

Circuit court properly dismissed employees' petition for a writ of mandamus because the employees had another adequate remedy at law; the employees could have appealed to the circuit court under the state the decision of the city board of aldermen to discharge them. *Prendergast v. City of Waveland*, 146 So. 3d 1021, 2014 Miss. App. LEXIS 483 (Miss. Ct. App. 2014).

Circuit court had to enter an order granting the appropriate building permit to the corporation as the city did not have discretion to deny a building permit to the

corporation as a building leased by the corporation was zoned for commercial business, which included a package retail store; the city had no legally valid reason for denying a building permit. *Vineyard Invs., LLC v. City of Madison*, 999 So. 2d 438, 2009 Miss. App. LEXIS 21 (Miss. Ct. App. 2009).

Where a person objects to unethical conduct by that body, that person is only entitled to file a charge with the Mississippi Ethics Commission for investigation and subsequent action in the courts. The Commission should then investigate the individual's allegations, and upon finding probable cause for believing that a violation has occurred, the Commission is statutorily commanded to refer all complaints and evidence gathered during its investigation to the attorney general and the local district attorney having jurisdiction for prosecution. *City of Jackson v. Greene*, 869 So. 2d 1020, 2004 Miss. LEXIS 337 (Miss. 2004).

Although the words, "final judgment" or "decision," were not used, since a board of supervisors had in fact rendered its final decision on the matter, having ordered the zoning administrator to take legal action in an effort to seek the removal of structures from a property owner's land, it had in fact rendered a final judgment; thus, the circuit court had jurisdiction to hear the owner's appeal. *Hinds County Bd. of*

Supervisors v. Leggette, 833 So. 2d 586, 2002 Miss. App. LEXIS 839 (Miss. Ct. App. 2002).

A mayor's veto is an appealable action of a "municipal authority" under the statute. City of Madison v. Shanks, 793 So. 2d 576, 2000 Miss. LEXIS 183 (Miss. 2000).

This section is not applicable to a school board's decision granting or denying the issuance of a Sixteenth Section land hunting and fishing lease. Prisock v. Perkins, 735 So. 2d 440, 1999 Miss. LEXIS 162 (Miss. 1999).

This section's 10-day time limit in which to appeal the decision of a board of supervisors is both mandatory and jurisdictional, even where the decision of a board is claimed to be unlawful. Newell v. Jones County, 731 So. 2d 580, 1999 Miss. LEXIS 24 (Miss. 1999).

Where, within 10 days of the granting of a special exception by a county board of supervisors, a property owner filed a motion to amend his pending complaint, which amended complaint raised the issues that would have been raised by an appeal, the defects in procedure were not on the timeliness or on the issues raised, but on the label, "complaint" instead of "appeal," and on the absence of a bill of exceptions, and, therefore, the property owner was entitled to promptly correct his deficiencies. Bowling v. Madison County Bd. of Supervisors, 724 So. 2d 431, 1998 Miss. App. LEXIS 952 (Miss. Ct. App. 1998).

The zoning decision of a local governing body which appears to be "fairly debatable" will not be disturbed on appeal, and will be set aside only if it clearly appears that the decision is arbitrary, capricious, discriminatory, illegal, or not supported by substantial evidence; neither the Supreme Court nor the circuit court should sit as a "super-zoning commission"; thus, the circuit court erred in overturning a city council's decision that the character of a neighborhood had changed substantially and that a public need existed to justify rezoning where the decision of the city council was fairly debatable. City of Biloxi v. Hilbert, 597 So. 2d 1276, 1992 Miss. LEXIS 150 (Miss. 1992).

Any court in state sitting as appellate court has inherent authority to allow ad-

ditional parties to participate in appeal upon timely application or upon court's invitation, and upon timely application any such third party should be permitted to intervene if that party claims interest relating to property or transaction which is subject of appeal and is so situated that disposition of appeal may as practical matter impair or impede his ability to protect that interest, unless that party's interest is adequately represented by existing party; parties other than original parties to appeal may participate in appellate process by filing amicus curiae at request of court or by leave of court; motion for leave to file amicus brief should demonstrate (1) amicus has interest in some other case involving similar question, or (2) counsel for a party is inadequate or brief insufficient, or (3) there are matters of fact or law which might otherwise escape court's attention, or (4) amicus has substantial legitimate interests that will likely be affected by outcome of case and which interest will not be adequately protected by those already parties. Cooper v. Picayune, 511 So. 2d 922, 1987 Miss. LEXIS 2677 (Miss. 1987).

Validation proceedings are the exclusive remedy for raising objections in connection with the issuance and sale of bonds, except those which could be or should be raised before the board of supervisors or municipal authorities, and such objections cannot be properly raised in a suit for an injunction. Chambers v. Perry, 183 So. 2d 645, 1966 Miss. LEXIS 1432 (Miss. 1966).

The statute as amended has the effect of requiring that objections to an issue of school bonds shall be heard in validation proceedings, whether or not the order of the board of supervisors overruling such objections is appealed from. In re Validation of \$250,000 School Bonds, 246 Miss. 470, 150 So. 2d 412, 1963 Miss. LEXIS 467 (Miss. 1963).

This section [Code 1942, § 1195] provides an adequate remedy at law precluding an injunction against an order denying a request to rezone property. Highland Village Land Co. v. Jackson, 243 Miss. 34, 137 So. 2d 549, 1962 Miss. LEXIS 310 (Miss. 1962).

From the nature of the judgments and decisions of the various boards mentioned

in this section [Code 1942, § 1195], persons who are not parties may have a direct pecuniary or other interest in such judgment or decision. *Ridgway v. Scott*, 237 Miss. 400, 114 So. 2d 844, 1959 Miss. LEXIS 484 (Miss. 1959).

Where following a published notice of a hearing at which no one appeared and protested, the board of supervisors adopted a resolution finding a need for housing authority to function, and no appeal was taken from the board's adopted resolution, which was legal on its face, a collateral attack upon the resolution in the form of a proceeding to enjoin the board of supervisors from acting under the Housing Authority Act was not maintainable. *Biloxi-Pascagoula Real Estate Board v. Mississippi Regional Housing Authority*, 231 Miss. 89, 94 So. 2d 793, 1957 Miss. LEXIS 492 (Miss. 1957).

Where, following the time when it became publicly known that the board of supervisors and the housing authority were attempting to apply for loans, the complainant without avail appeared before the board and asked it to rescind its prior action declaring the need for the authority, and the approval of the application for preliminary loans, but took no appeal to the circuit court, the board's action was not subject to a collateral attack by a suit to enjoin it from proceeding under the Housing Authority Act. *Biloxi-Pascagoula Real Estate Board v. Mississippi Regional Housing Authority*, 231 Miss. 89, 94 So. 2d 793, 1957 Miss. LEXIS 492 (Miss. 1957).

Where objectors to a school bond issue charged that a large majority of the petitioners would not have signed the petition had they known that the proposed issue would raise their taxes, it was their duty to appeal to the circuit court from a decision of the board of supervisors and in absence of such an appeal the objection constitutes a collateral attack and is too late. *In re Magee Consol. School Bonds*, 212 Miss. 454, 54 So. 2d 664, 1951 Miss. LEXIS 469 (Miss. 1951).

Right to appeal from refusal of board of supervisors to levy tax for school district is not a "speedy remedy" within meaning of Code 1942, § 1109, so as to bar issuance of writ of mandamus. *State ex rel. Chatham*

v. Bd. of Supervisors, 209 Miss. 79, 46 So. 2d 73, 1950 Miss. LEXIS 363 (Miss. 1950).

Statute (Code 1942, § 2932) relating to allowance of claims against county is not the only statutory provision authorizing an appeal to the circuit court from disallowance of a claim by county board of supervisors, since this section [Code 1942, § 1195] is the general statute providing for such an appeal. *Board of Supervisors v. Jones*, 199 Miss. 373, 24 So. 2d 844, 1946 Miss. LEXIS 206 (Miss. 1946).

Sheriff's claim presented to county board of supervisors for entering, returning and serving the road overseer's commission, for services required of the sheriff by the board of supervisors for which no fees were fixed, and for executing decrees, judgments, orders of process of the Supreme Court, chancery court or board of supervisors, was not required to be accompanied by any evidence of performance or delivery of services to an amount equal to the compensation claimed, irrespective of whether Code 1942, § 2932 or this section [Code 1942, § 1195] was applicable to the presentation of such claim. *Board of Supervisors v. Jones*, 199 Miss. 373, 24 So. 2d 844, 1946 Miss. LEXIS 206 (Miss. 1946).

Adjudication of county board of supervisors as to sufficiency of signatures to petition for an election to determine whether traffic in light wines and beer should be excluded from county, was interlocutory, and entire cause, including that issue, must on pertinent and competent protest be adjudicated by the board upon trial after the election before the final judgment could be entered in the case. *Costas v. Board of Sup'rs*, 198 Miss. 440, 22 So. 2d 229, 1945 Miss. LEXIS 213 (Miss. 1945).

This section [Code 1942, § 1195] (Code 1906, § 80) gives right of appeal to any person aggrieved by a judgment or decision of a board of supervisors and requires that bill of exceptions embodying the facts as duly presented shall be signed by the person acting as president of the board. *Wilkinson County v. Tillery*, 122 Miss. 515, 84 So. 465, 1920 Miss. LEXIS 451 (Miss. 1920).

Code 1906, § 81 (Code 1942, § 1196), applies specifically to all appeals relating to taxes, while this section [Code 1942, § 1195] (Code 1906, § 80) applies to all

other cases. *Kuhn Bros. v. Warren County*, 98 Miss. 879, 54 So. 442, 1910 Miss. LEXIS 137 (Miss. 1910).

This section [Code 1942, § 1195] (Code 1892, § 79) allows appeal from board of supervisors to the circuit court for final judgment there. Section 85 (Code 1942, § 1201), limits appeals from circuit court to cases where amount in controversy exceeds \$50 if originating in courts of justices of the peace. There is no such limitation as to boards of supervisors, and § 93 (Code 1942, § 1210) allows board to appeal from a judgment without bond. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007, 1906 Miss. LEXIS 153 (Miss. 1906).

This section [Code 1942, § 1195] applies to appeals generally from judgments of boards of supervisors, while Code 1906 § 81 (Code 1942, § 1196) regulates appeals relating to assessments of property for taxation. *Jennings v. Board of Sup'rs*, 79 Miss. 523, 31 So. 107 (Miss. 1901).

2. Rules of Civil Procedure.

The Rules of Civil Procedure do not replace the statute. *Bowling v. Madison County Bd. of Supervisors*, 724 So. 2d 431, 1998 Miss. App. LEXIS 952 (Miss. Ct. App. 1998).

3. Bill of exceptions in general.

Property owner's filing of the bill of exceptions in the circuit court did not deprive that court of subject-matter jurisdiction because the supreme court intended its holding that the ten-day deadline contained in the statute applied to the filing of the bill of exceptions with the clerk of the county or municipal board to apply prospectively rather than retroactively; the owner's appeal before the court of appeals was pending when the supreme court made the holding. *Wirtz v. Adams Cty. Bd. of Supervisors*, — So. 3d —, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. Apr. 16, 2019).

Circuit court properly dismissed a property owner's appeal because the owner's bill of exceptions was fatally defective for failing to provide a sufficient record, and the owner refused to amend the bill of exceptions to include the minutes of the board of supervisors; meeting minutes of a

board of supervisors constituted relevant material necessary for a sufficient record on appeal because public boards spoke and acted solely through their meeting minutes. *Wirtz v. Adams Cty. Bd. of Supervisors*, — So. 3d —, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. Apr. 16, 2019).

Circuit court was limited to determining whether the city council, based on the evidence contained in the bill of exceptions, had erred in approving the city's application to use property as a recreation center because the circuit court was acting as an appellate court on review of a bill of exceptions challenging the decision or judgment of a municipal authority. *Barrett v. City of Gulfport*, 196 So. 3d 905, 2016 Miss. LEXIS 164 (Miss. 2016).

In a case in which a losing candidate for mayor challenged the municipal election commission's decision to place the winning candidate's name on the ballot, the circuit court did not have jurisdiction to hear the losing candidate's challenge via a writ of mandamus. The appropriate procedural mechanism for challenging the commission's decision was through a bill of exceptions under Miss. Code Ann. § 11-51-75. *Powell v. Mun. Election Comm'n*, 156 So. 3d 250, 2014 Miss. LEXIS 601 (Miss. 2014).

Trial court was without jurisdiction to review a property owner's claim that a town's destruction of the owner's property was an unconstitutional taking because the owner failed to perfect the owner's appeal from the town board of alderman's decision to demolish the owner's warehouse as a public nuisance in that the owner failed to comply with Miss. Code Ann. § 11-51-75, by not embodying the facts and proceedings below in a proper bill of exceptions. *Carthan v. Patterson*, 134 So. 3d 374, 2014 Miss. App. LEXIS 130 (Miss. Ct. App. 2014).

Bill of exceptions did not comply with the procedural requirements set forth in Miss. Code Ann. § 11-51-75 because it did not contain the mayor's signature, and a city also failed to comply with the requirements because, rather than noting the portions of the resident's bill of exceptions that it deemed incorrect and allowing him to amend it, it filed its own bill of exceptions; however, the court of appeals did

not dismiss for lack of subject matter jurisdiction the resident's appeal of a decision of the city's board of aldermen because the bills of exceptions contained the pertinent and important facts and documents and constituted a record upon which the court of appeals could intelligently act. *McKee v. City of Starkville*, 97 So. 3d 97, 2012 Miss. App. LEXIS 480 (Miss. Ct. App. 2012).

Circuit court lacked jurisdiction over a high school's attempted appeal of an expulsion decision by a school board because the student's bill of exceptions lacked the signature of the school board president and, as such, the bill of exceptions did not comply with Miss. Code Ann. §§ 37-7-115 and 11-51-75. *M.L.R. v. Pontotoc City Sch. Dist. Bd. of Trs.*, 46 So. 3d 874, 2010 Miss. App. LEXIS 597 (Miss. Ct. App. 2010).

Plaintiff property owner was not seeking to overturn a decision to condemn his property or destroy his property, he was asserting his right to constitutional protections, so his failure to file his notice of appeal and bill of exceptions was not dispositive in this case. *Pearson v. City of Louisville*, 2008 U.S. Dist. LEXIS 89580 (N.D. Miss. Nov. 4, 2008).

Where the circuit court dismissed a company's challenge to the City's decision to award a sewer improvement project to the second lowest bidder, the circuit court did not err by not including a news release as part of the record showing that the second lowest bidder had been fined extensively for safety violations which resulted in the death of one of its employees because the press release was not included in the bill of exceptions. *Nelson v. City of Horn Lake*, 968 So. 2d 938, 2007 Miss. LEXIS 636 (Miss. 2007).

District court found a part of an ordinance intended to regulate businesses providing nude exotic dancing but that restricted other sexual conduct, was both overbroad and in conflict with other parts of the ordinance; time periods in the statute were also in need of amendment, and the statutory procedure for filing a bill of exceptions on judicial appeal required to be followed. *Freelance Entm't, LLC v. Sanders*, 280 F. Supp. 2d 533, 2003 U.S. Dist. LEXIS 21831 (N.D. Miss. 2003).

Dismissal of property owner's attempted appeal of the county board of

supervisors' denial of the property owner's request for a conditional use permit was error as the property owner was not obligated to file a bill of exceptions within the statutory time period for filing an appeal in order to confer subject matter jurisdiction on the trial court as the statute only required that a pleading be filed indicating an intent to appeal, which the property owner filed, and that the bill of exceptions be filed within a reasonable time as it was necessary to decide the appeal. *Bowen v. DeSoto County Bd. of Supervisors*, 850 So. 2d 1156, 2002 Miss. App. LEXIS 324 (Miss. Ct. App. 2002), *aff'd*, 852 So. 2d 21, 2003 Miss. LEXIS 357 (Miss. 2003).

Even if a school board held a secret meeting for the purpose of rendering impossible a timely appeal, the plaintiff's failure to file a bill of exceptions was fatal to the appeal; further, even if the plaintiff did all he could to obtain execution of a tendered bill of exceptions, but his efforts were refused by the school board, he should have proceeded by mandamus to compel signature. *Prisock v. Perkins*, 1998 Miss. LEXIS 633 (Miss. Dec. 31, 1998), *op. withdrawn*, sub. *op.*, 735 So. 2d 440, 1999 Miss. LEXIS 162 (Miss. 1999).

The bill of exceptions required by § 11-51-75 is necessary to vest the circuit court with subject matter jurisdiction in all appeals from boards of supervisors, regardless of the issues presented. (*Overruling Evans v. Sharkey County*, 89 Miss 302, 42 So 173 (1906)). Thus, the failure to obtain and file a bill of exceptions as prescribed by § 11-51-75 was fatal to an appeal prosecuted under § 65-7-67. *McIntosh v. Amacker*, 592 So. 2d 525, 1991 Miss. LEXIS 961 (Miss. 1991).

Neither the circuit court nor the Supreme Court had the authority to consider a county supervisor's attempted appeal from an order of the board of supervisors finding that he had removed himself from his district and declaring his office vacant under the authority of § 25-1-59, where the supervisor filed a notice of appeal to the circuit court but failed to file a bill of exceptions as required by § 11-51-75. *Moore v. Sanders*, 569 So. 2d 1148, 1990 Miss. LEXIS 445 (Miss. 1990).

In the absence of a bill of exceptions a circuit court had no jurisdiction to reverse

the action of the board of supervisors pertaining to a lease of certain 16th section lands. *Cox v. Board of Supervisors*, 290 So. 2d 629, 1974 Miss. LEXIS 1716 (Miss. 1974).

A bill of exceptions which embodies the facts and the decision of the city council on a petition to rezone property, and is signed by the mayor, is sufficient to confer jurisdiction on the circuit court despite the fact that a copy of the actual ordinance formally setting forth the council's decision was omitted from the bill. *Weathersby v. Jackson*, 226 So. 2d 739, 1969 Miss. LEXIS 1314 (Miss. 1969).

On appeal to the circuit court from an order of the board of supervisors of Neshoba county directing issuance of bonds in the amount of \$40,000 for the benefit of a high school, the circuit court had authority to hear and determine the matter only on the case as presented by the bill of exceptions as an appellate court, and hence the court was correct in refusing to permit the introduction of evidence on the hearing of the cause. *East Neshoba Vocational High School Bonds v. Board of Sup'rs*, 213 Miss. 146, 56 So. 2d 394, 1952 Miss. LEXIS 343 (Miss. 1952).

Where a bill of exceptions in an appeal from an order of the Board of Supervisors, adjudicating all the necessary jurisdictional facts to entitle the Board to issue bonds on behalf of a Consolidated School District, undertook to recite the matters and things which had transpired at the meeting at which the order had been made, by setting forth the objections made at the meeting and averring facts in conflict with the express adjudications contained in the order, but failed to state the grounds on which the judgment appealed from had been entered, as required by statute in case of appeal, the order appealed from, which was attached to the bill of exceptions as an exhibit and made a part thereof by statute, was affirmed. *Adcock v. Board of Sup'rs*, 191 Miss. 379, 2 So. 2d 556, 1941 Miss. LEXIS 137 (Miss. 1941).

That order disallowing city's claim for road taxes collected by county was not entered on minutes of board of supervisors and embodied in bill of exceptions held not to deprive circuit court of jurisdiction of

appeal therefrom on bill of exceptions, where record contained agreement by parties reciting that claim was rejected. *Grenada County v. Grenada*, 168 Miss. 68, 150 So. 655, 1933 Miss. LEXIS 179 (Miss. 1933).

Thirty days within which to procure signing of bill of exceptions after adjournment of term of board of supervisors held not unreasonable time. *Board of Sup'rs v. Stephenson*, 160 Miss. 372, 134 So. 142, 1931 Miss. LEXIS 182 (Miss. 1931).

"Next term" of circuit court, to which appeal from decision of board of supervisors must go, is term next after appeal has been perfected. *Board of Sup'rs v. Stephenson*, 160 Miss. 372, 134 So. 142, 1931 Miss. LEXIS 182 (Miss. 1931).

Bill of exceptions to order annexing territory to school district, with uncontroverted caption reciting that objectors were taxpayers of such territory, a statement of fact, sufficiently showed their interest to allow them to appeal. *Brannan v. Board of Sup'rs*, 141 Miss. 444, 106 So. 768, 1926 Miss. LEXIS 448 (Miss. 1926).

Without a bill of exceptions a circuit court has no jurisdiction of an appeal from a judgment of a board of supervisors disallowing a claim against a county and can only dismiss the appeal. *Yandell v. Madison County*, 79 Miss. 212, 30 So. 606, 1901 Miss. LEXIS 36 (Miss. 1901).

A bill of exceptions to the action of a board of supervisors must be taken and signed during the term, unless by consent or under an order of court, the time for preparing and perfecting it be extended into vacation. *McGee v. Jones*, 63 Miss. 453, 1886 Miss. LEXIS 121 (Miss. 1886); *Board of Sup'rs v. Stephenson*, 160 Miss. 372, 134 So. 142, 1931 Miss. LEXIS 182 (Miss. 1931).

4. —Signing bill of exceptions.

Given that the Supreme Court must resolve doubts in favor of constitutionality, it holds that Miss. Code Ann. § 11-51-75 does not establish the signature requirement as a jurisdictional prerequisite; accordingly, as it does not exist in the statute, it cannot be an unconstitutional infringement upon the procedural prerogative of the Court, because the statute neither mandates nor forbids that the

courts do anything whatsoever. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Bill of exceptions is, in and of itself, a jurisdictional requirement should an aggrieved party wish to appeal a decision of a county or municipal board. However, the long history of the Supreme Court of Mississippi's opinions in bill of exceptions cases convinces it that a perfect bill of exceptions is not a jurisdictional requirement and, more narrowly, the signature of the president of the board is not a jurisdictional requirement. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Supreme Court of Mississippi clarifies *Stewart v. City of Pascagoula*, 206 So. 2d 325 (Miss. 1968), and *Weathersby v. City of Jackson*, 226 So. 2d 739 (Miss. 1969), and makes it clear that, fatal or not, an insufficient record does not rob the circuit court of jurisdiction as the term is properly understood. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Because the Supreme Court of Mississippi is unconvinced the Legislature never intended the signature requirement to be a jurisdictional prerequisite, and given the three operating principles for analyzing the signature requirement, the Supreme Court declines to find that the pertinent part of Miss. Code Ann. § 11-51-75 is unconstitutional. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Resolving doubts in favor of the constitutionality of Miss. Code Ann. § 11-51-75 leads to the conclusion, backed by several cases, that the Legislature did not intend the signature requirement to be a constitutional prerequisite. Therefore, it cannot be unconstitutional as such. Further, the Supreme Court of Mississippi clarifies that, although the bill of exceptions itself is a jurisdictional requirement for the circuit court to hear an appeal via § 11-51-75, imperfections in it go to the adequacy of the record to decide the excepted issues rather than the authority of the court to hear the appeal. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Supreme Court of Mississippi overrules the holding in *Bowen v. DeSoto County*

Board of Supervisors, 852 So. 2d 21, 24 (¶ 9) (Miss. 2003), that the bill of exceptions is nothing more than an optional vehicle for transmitting the record to the circuit court and that some other filing, such as a notice of appeal, can suffice to confer jurisdiction there. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

In order to restore fairness and sensibility to the bill of exceptions process, the Supreme Court of Mississippi holds that, going forward, the 10-day deadline contained in Miss. Code Ann. § 11-51-75 applies to the filing of the bill of exceptions with the clerk of the county or municipal board. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Taxpayer's failure to obtain the signature of the board of supervisor's president, standing alone, did not deprive the circuit court of jurisdiction to review a taxpayer's challenge to the board's failure to comply with the mandatory statutory notice requirements. *Tunica Cty. Bd. of Supervisors v. HWCC-Tunica, LLC*, 237 So. 3d 115, 2017 Miss. LEXIS 458 (Miss. 2017).

When the appellant signed the bill of exceptions, he essentially waived an issue that was not included in the bill and agreed that it would not be considered on appeal. *Van Meter v. City of Greenwood*, 724 So. 2d 925, 1998 Miss. App. LEXIS 988 (Miss. Ct. App. 1998).

Signature of the bill of exceptions by the attorney for an appellant city does not meet this requirement. *City of Jackson v. Varia, Inc.*, 241 Miss. 705, 133 So. 2d 16, 1961 Miss. LEXIS 386 (Miss. 1961).

On appeal from the adoption by a city of a re-zoning ordinance, the mayor may not arbitrarily refuse to sign a bill of exceptions on the ground that it is incorrect, but should sign it with corrections. *Reed v. Adams*, 236 Miss. 333, 111 So. 2d 222, 1959 Miss. LEXIS 323 (Miss. 1959).

The officer by whom bill of exceptions is to be signed is without discretion in the matter. *Koestler v. Dallas Tank Co.*, 234 Miss. 112, 107 So. 2d 361 (1958).

A bill of exceptions to a decision of municipal authorities is properly signed by successor in office of the mayor at the time of decision, the latter having refused to sign. *Koestler v. Dallas Tank Co.*, 234 Miss. 112, 107 So. 2d 361 (1958).

The act of the president of a Board of Supervisors, in signing a bill of exceptions to the Board's order for the issuance of school bonds, was an acknowledgment that the objections set out in the bill were in fact made by the persons who had appeared as objectors, but did not constitute an agreement that the facts therein recited were true. *Adcock v. Board of Sup'rs*, 191 Miss. 379, 2 So. 2d 556, 1941 Miss. LEXIS 137 (Miss. 1941).

When bill of exceptions is duly presented, it is the duty of the presiding officer to sign same. He has no discretion in the matter. *Polk v. Hattiesburg*, 109 Miss. 872, 69 So. 675, 1915 Miss. LEXIS 236 (Miss. 1915); *Polk v. Hattiesburg*, 110 Miss. 80, 69 So. 1005, 1915 Miss. LEXIS 19 (Miss. 1915).

Where bill of exceptions was not taken and signed during term of municipal board at which the order complained of was passed, and time was not extended, the mayor was correct in refusing to sign the bill. *Hathorn v. Morgan*, 107 Miss. 589, 65 So. 643, 1914 Miss. LEXIS 123 (Miss. 1914).

Only the president of the board of supervisors can sign a bill of exceptions upon appeals under this section [Code 1942, § 1195] and if he refuses he may be compelled by mandamus. *Roach v. Tallahatchie County*, 78 Miss. 303, 29 So. 93, 1900 Miss. LEXIS 132 (Miss. 1900).

Section 798, Code 1906, providing for all bills of exceptions to be signed by attorneys where the judge refuses to sign, does not apply to appeals under this section [Code 1942, § 1195]. *Roach v. Tallahatchie County*, 78 Miss. 303, 29 So. 93, 1900 Miss. LEXIS 132 (Miss. 1900).

When the bill is duly prepared and tendered to the president during the term, the exceptor will not be prejudiced because of the failure of that officer to sign it during the term. *McGee v. Beall*, 63 Miss. 455, 1886 Miss. LEXIS 122 (Miss. 1886).

5. Appeal bond.

Decision of Board of Supervisors that petition for tax levy was signed by majority of electors held final and appealable without bond. *Moore v. Board of Sup'rs*, 151 Miss. 671, 118 So. 349, 1928 Miss. LEXIS 330 (Miss. 1928).

The appeal provided for by this section [Code 1942, § 1195] can be prosecuted without bond. *Monroe County v. Strong*, 78 Miss. 565, 29 So. 530, 1900 Miss. LEXIS 170 (Miss. 1900).

6. Persons entitled to appeal.

Circuit court did not abuse its discretion in finding that the president of a downtown partnership had standing to challenge the city council's rezoning decision where the relief sought by the president on behalf of the partnership would insure the benefit of the members of the association actually injured, i.e., the remaining property owners in the district. *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

In an appeal under Miss. Code Ann. § 11-51-75 by vendors of a city council's decision to award a contract for the operation of a wastewater facility to a partnership, the circuit court properly denied the partnership's motion to intervene because the partnership was not aggrieved and was neither a proper, necessary, nor indispensable party. *City of Jackson v. United Water Servs.*, 47 So. 3d 1160, 2010 Miss. LEXIS 602 (Miss. 2010).

Mississippi Supreme Court adopted the federal test for associational standing; under that test, the Supreme Court found that the trial court erred in dismissing the manufactured housing association's bill of exceptions regarding the adoption of a zoning ordinance and map restricting manufactured housing developments in the city for lack of standing by the association because (1) one of the association's members owned property and managed a retail manufacturing housing center in the city; (2) the zoning decision would have a direct negative economic impact on any member of the association that sold manufactured homes in the city because their buyer's market would be diminished; and (3) the association's challenge to the city's zoning restrictions was of importance to the association's members. *Miss. Manufactured Hous. Assn v. Bd. of Aldermen*, 870 So. 2d 1189, 2004 Miss. LEXIS 362 (Miss. 2004).

Statute outlined the proper procedure to appeal when someone was aggrieved by a decision of a municipality; it did not in

any way confer standing. *Burgess v. City of Gulfport*, 814 So. 2d 149, 2002 Miss. LEXIS 142 (Miss. 2002).

The appellant was not a person aggrieved by a judgment or decision of the board where it sought review of the board's order calling for a special election as an election had yet to be held and the board had declined to act unilaterally on the appellant's petition. *Miss. Waste of Hancock County, Inc. v. Bd. of Supervisors*, 818 So. 2d 326, 2001 Miss. LEXIS 43 (Miss. 2001).

Any court in state sitting as appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon court's invitation, and upon timely application any such third party should be permitted to intervene if that party claims interest relating to property or transaction which is subject of appeal and is so situated that disposition of appeal may as practical matter impair or impede his ability to protect that interest, unless that party's interest is adequately represented by existing party; parties other than original parties to appeal may participate in appellate process by filing *amicus curiae* at request of court or by leave of court; motion for leave to file *amicus* brief should demonstrate (1) *amicus* has interest in some other case involving similar question, or (2) counsel for a party is inadequate or brief insufficient, or (3) there are matters of fact or law which might otherwise escape court's attention, or (4) *amicus* has substantial legitimate interests that will likely be affected by outcome of case and which interest will not be adequately protected by those already parties. *Cooper v. Picayune*, 511 So. 2d 922, 1987 Miss. LEXIS 2677 (Miss. 1987).

Community improvement association may have standing to appeal from decision of board of supervisors or municipal authorities, by falling within category of "persons aggrieved," on showing extent of interest, adverse effect, participation of membership, and authority of association to act pursuant to its charter, by laws, and minutes. *Belhaven Improv. Asso. v. Jackson*, 507 So. 2d 41, 1987 Miss. LEXIS 2428 (Miss. 1987).

One not an abutting owner, who will be compelled by the closing of an alley to take

a less direct route to his place of business, is not a "person aggrieved" by a determination of the city to close the alley, so as to be entitled to appeal therefrom. *Hattisburg v. Colson*, 236 Miss. 237, 109 So. 2d 868, 1959 Miss. LEXIS 312 (Miss. 1959).

Mortgagees of abutting lots are not "persons aggrieved" so as to have a right to appeal from the city's determination to close an alley, unless the adequacy of their security will be impaired by such closing. *Hattisburg v. Colson*, 236 Miss. 237, 109 So. 2d 868, 1959 Miss. LEXIS 312 (Miss. 1959).

A foreign power and light company qualified to do business within the state which had a considerable investment in electric distribution lines in a county and the election district sought to be incorporated as an electric power district, was a person adversely affected by the order of the board of supervisors purporting to create a power district, and could appeal therefrom. *Mississippi Power & Light Co. v. Mississippi Power Dist.*, 230 Miss. 594, 93 So. 2d 446, 1957 Miss. LEXIS 402 (Miss. 1957).

This section [Code 1942, § 1195] authorizes an appeal by any qualified elector and taxpayer from a decision of the board of supervisors ordering an election to determine as to the sale of intoxicating liquors in the county. *Ferguson v. Board of Sup'rs*, 71 Miss. 524, 14 So. 81, 1893 Miss. LEXIS 106 (Miss. 1893).

Any taxpayer may appeal from a decision allowing a claim against the county. *Wilson v. Wallace*, 64 Miss. 13, 8 So. 128, 1886 Miss. LEXIS 4 (Miss. 1886).

It is unnecessary that the appellant be a party to the record; he may show by evidence apart from the proceedings in the supervisors' court that his right has thus been injured by said judgment. *Deberry v. President & Selectmen of Holly Springs*, 35 Miss. 385, 1858 Miss. LEXIS 39 (Miss. 1858).

7. Time for appeal.

Because a county board of supervisors filed a notice of appeal 96 days after a circuit court entered an order and opinion, reversing the board's decision, the appellate court lacked jurisdiction as the appeal was untimely filed in that the board's

motion for rehearing in the circuit court, which was filed 11 days after the circuit court entered its judgment, did not toll the time for filing the notice of appeal. *DeSoto Cty. v. Std. Constr. Co.*, — So. 3d —, 2019 Miss. App. LEXIS 31 (Miss. Ct. App. Jan. 22, 2019).

Circuit court erred in dismissing the homeowners' complaint challenging rezoning of nearby property as untimely under Miss. Code Ann. § 11-51-75 where the published notice for the rezoning hearing lacked any mention of the parcels at issue, and as a result of that deficiency, § 11-51-75 was not the exclusive remedy. *Lee v. City of Byram*, 269 So. 3d 1194, 2018 Miss. App. LEXIS 403 (Miss. Ct. App. 2018).

Plain, unambiguous language of the statute counts the ten-day period from the date of the completed decision to be appealed. *Pemberton Props. v. Mayor & Bd. of Aldermen*, 224 So. 3d 531, 2017 Miss. LEXIS 52 (Miss. 2017).

Circuit court properly dismissed rental-property owners' complaint against a mayor and a city's board of aldermen because the bill of exceptions was not timely presented; the appeal period for city ordinances began on the date an ordinance was adopted, and the owners' bill of exceptions was presented to the city outside the ten-day period following the date of adoption. *Pemberton Props. v. Mayor & Bd. of Aldermen*, 224 So. 3d 531, 2017 Miss. LEXIS 52 (Miss. 2017).

Wrongful termination case was properly dismissed due to failure to file a timely appeal, which was the exclusive remedy for a party aggrieved by a decision of a municipal authority; if an employee believed that the action of the board was unlawful, he was required to appeal its decision within 10 days. *Williams v. City of Belzoni*, 229 So. 3d 171, 2017 Miss. App. LEXIS 126 (Miss. Ct. App. 2017).

Residents' bill of exceptions was timely as to an appeal of the board's subsequent order reconsidering its decision and issuing a new order that abandon the railroad crossing as it was filed within 10 days of the reconsideration decision. *Lowndes Cnty. v. McClanahan*, 161 So. 3d 1052, 2015 Miss. LEXIS 193 (Miss. 2015).

As to a board of supervisors' first order that abandoned a railroad crossing, the

residents' bill of exception was untimely under Miss. Code Ann. § 11-51-75 as it was filed more than 10 days after the order was issued. *Lowndes Cnty. v. McClanahan*, 161 So. 3d 1052, 2015 Miss. LEXIS 193 (Miss. 2015).

Although the residents, who did not file a timely appeal, claimed their right to appeal was preserved because the board effectively granted their motion for rehearing, case law held that the statute did not permit rehearings, and a timely appeal was the exclusive remedy. *Lowndes County v. McClanahan*, 161 So. 3d 1091, 2014 Miss. App. LEXIS 228 (Miss. Ct. App. 2014), rev'd, 161 So. 3d 1052, 2015 Miss. LEXIS 193 (Miss. 2015).

Residents did not file their appeal within 10 days of the adjournment of the meeting of the board; the appeal, having been filed under the statute, did not conform to the statute's requirements. *Lowndes County v. McClanahan*, 161 So. 3d 1091, 2014 Miss. App. LEXIS 228 (Miss. Ct. App. 2014), rev'd, 161 So. 3d 1052, 2015 Miss. LEXIS 193 (Miss. 2015).

Complaint that was amended to include a claim under Miss. Code Ann. § 11-51-75 (2002), which the trial court advised would provide for review of a decision of municipal authorities essentially disqualifying a candidate from a mayoral election, was properly dismissed. The claim was not made within ten days of the municipal authorities' decision. *Town of Terry v. Smith*, 48 So. 3d 507, 2010 Miss. LEXIS 567 (Miss. 2010).

Judgment for municipal authorities in a case filed by citizens over increases in trash collection fees was vacated. The case should have been dismissed for lack of jurisdiction because the citizens failed to perfect its appeal from the municipal authorities within the time limitations of Miss. Code Ann. § 11-51-75 (2002) for such an appeal, in that the group had ten days from the end of the sessions during which the rate increases were made to appeal those increases, but they did not do so until two or more years later. *Foster v. Edwards*, 61 So. 3d 960, 2011 Miss. App. LEXIS 251 (Miss. Ct. App. 2011).

Buyer's appeal of the city's decision not to sign his bill of exceptions was filed outside the ten-day period allowed by

Miss. Code Ann. § 11-51-75; pursuant to Miss. Code Ann. § 21-15-33, the ten-day time period for appeal began when the city adjourned the meeting on September 11, 2007, after making a decision about the property. *Rankin Group, Inc. v. City of Richland*, 8 So. 3d 259, 2009 Miss. App. LEXIS 142 (Miss. Ct. App. 2009).

Trial court properly dismissed property owners' appeal of the denial of their rezoning petition because the petition to rezone was time-barred; the city council denied the owners' petition to rezone on April 17, 2007, but the owners did not appeal to the trial court until May 3, 2007, clearly more than 10 days after the city council's decision. *Pruitt v. Zoning Bd. of the City of Laurel*, 5 So. 3d 464, 2008 Miss. App. LEXIS 613 (Miss. Ct. App. 2008).

Since the landowners' appeal was not filed within 10 days from the day of adjournment of the board meeting, under Miss. Code Ann. § 11-51-75 neither the circuit court, nor the appellate court had jurisdiction to consider the appeal; although the failure to file the appeal within 10 days determined the outcome of the landowners' appeal, the landowners had not presented a proper bill of exceptions because the bill was not signed by the person acting as president of the board of supervisors or of the municipal authorities. *Tilghman v. City of Louisville*, 874 So. 2d 1025, 2004 Miss. App. LEXIS 506 (Miss. Ct. App. 2004).

Although the owner failed to file a bill of exceptions with his notice of appeal, it was not necessary to file the bill of exceptions within 10 days where the owner had timely and properly filed a notice of appeal, which was sufficient to vest jurisdiction; the owner could have a reasonable amount of time in which to file the bill of exceptions. *Bowen v. DeSoto County Bd. of Supervisors*, 852 So. 2d 21, 2003 Miss. LEXIS 357 (Miss. 2003), overruled, overruled in part, *City of Jackson v. Allen*, 242 So. 3d 8, 2018 Miss. LEXIS 53 (Miss. 2018).

Neighbor did not file his bill of exception until well beyond the time frame dictated by statute; as such, the filing was not timely and the circuit court was correct in dismissing the appeal with prejudice for failure to have subject matter jurisdiction.

Lucas v. Williamson, 852 So. 2d 67, 2003 Miss. App. LEXIS 22 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 616 (Miss. 2003).

Trial court reached the correct result in granting judgment to the city, but erred in not dismissing the employee's claim on jurisdictional grounds due to his failure to timely appeal the adverse decision of the city to terminate his services in accordance with Miss. Code Ann. § 11-51-75 (2002); the employee had 10 days to appeal after the city board of aldermen failed to sustain a motion to take up the mayor's veto of the employee's reinstatement. *McPhail v. City of Lumberton*, 832 So. 2d 489, 2002 Miss. LEXIS 394 (Miss. 2002).

Final actions by municipal authorities or a board of supervisors was appealable under the statute, but an appeal had to be filed within the prescribed 10 days from the day of adjournment of the board of supervisors session, or the circuit court or appellate court will not have jurisdiction to consider the appeal. *House v. Honea*, 799 So. 2d 882, 2001 Miss. LEXIS 307 (Miss. 2001).

A mayor's veto became final for purposes of perfecting an appeal on the date it was accepted by the board of aldermen and, consequently, an appeal filed within 10 days of that date was timely. *City of Madison v. Shanks*, 793 So. 2d 576, 2000 Miss. LEXIS 183 (Miss. 2000).

An appeal under the statute was filed in a timely manner where (1) the mayor issued a veto which was filed with the city clerk on June 27, (2) the board of aldermen accepted the veto and refused to override it on August 2, and (3) the appeal was filed on August 12. The veto became effective on August 2, rather than on June 27, and the appeal was filed within 10 days thereafter. *City of Madison v. Shanks*, 793 So. 2d 576, 2000 Miss. LEXIS 183 (Miss. 2000).

A bill of exceptions was properly before the Circuit Court in an action concerning an appeal of the decision of a county commission and board to sell real property owned by the county; although the transaction did in fact substitute one parcel of property for another parcel, it was nevertheless a conveyance evidenced by a special warranty deed which was directly

challenged by the bill of exceptions, and the fact that the plaintiff did not properly appeal the previous sale of land was irrelevant since it challenged the latter decision within 10 days as required by the statute. *Coast Materials Co. v. Harrison County Dev. Comm'n*, 730 So. 2d 1128, 1998 Miss. LEXIS 632 (Miss. 1998).

The ten-day period for an appeal of a decision by the defendant board of aldermen did not begin when the board awarded a contract to a competitor of the plaintiff, but on the later date when the board received requisite approvals from the Mississippi Department of Transportation and the Federal Highway Commission. *J. H. Parker Constr. Co. v. Board of Aldermen*, 721 So. 2d 671, 1998 Miss. App. LEXIS 630 (Miss. Ct. App. 1998).

Heavy equipment vendor's action against a county board of supervisors which was timely filed in the chancery court, but later transferred to the circuit court, would be deemed to have been timely filed in the circuit court. *Canton Farm Equipment, Inc. v. Richardson*, 501 So. 2d 1098, 1987 Miss. LEXIS 2273 (Miss. 1987).

Since a city utilities commission was not a municipal authority, the vacation pay cause of one of its employees should not have been dismissed on the ground that the employee had failed to appeal within 10 days of the adjournment date of the commission's regular meeting. *Robinson v. Utilities Com. of Columbus*, 487 So. 2d 827, 1986 Miss. LEXIS 2439 (Miss. 1986).

A bill of exceptions filed on June 13, 1980, to challenge a rezoning of certain property was not untimely where, although the Mayor and Board of Aldermen voted on May 6, 1980, to reclassify the property, the rezoning ordinance did not become effective until written, signed and formally adopted on June 3, 1980, at which time the ten-day appeal period commenced to run. *City of Oxford v. Inman*, 405 So. 2d 111, 1981 Miss. LEXIS 2242 (Miss. 1981).

Order of board of supervisors, adjudicating sufficiency of petitions for election and providing for election to exclude traffic in light wines and beer in the county, was an interlocutory order and not a final

order, requiring appeal therefrom within ten days in order to question sufficiency of petitions. *Costas v. Board of Sup'rs*, 196 Miss. 104, 15 So. 2d 365, 1943 Miss. LEXIS 6 (Miss. 1943).

Although board of supervisors was acting judicially in adjudicating sufficiency of petitions for election and providing for election to exclude traffic in light wines and beer in county, it did not complete its judicial functions in regard to such matter, as regards appeal therefrom, until the election was held and it adjudicated that notice of the election stated the proposition to be voted on, that it was published as required by law and that the election had been conducted according to law in all other respects. *Costas v. Board of Sup'rs*, 196 Miss. 104, 15 So. 2d 365, 1943 Miss. LEXIS 6 (Miss. 1943).

Final order of board of supervisors from which appeal will lie in the exclusion of light wines and beer in the county is the order showing affirmatively an adjudication as to the sufficiency of the notice of the election and publication according to law, that the notice contained a statement of the proposition to be voted on at the election, and that the report of the election commissioners disclosed that a majority of those voting in the election had voted in favor of the exclusion. *Costas v. Board of Sup'rs*, 196 Miss. 104, 15 So. 2d 365, 1943 Miss. LEXIS 6 (Miss. 1943).

The board is the only tribunal empowered to take the initiative action necessary to the lawful establishment of a stock law. Until such action is taken no appeal properly lies. *Bailey v. Delta Electric Light, Power & Mfg. Co.*, 86 Miss. 634, 38 So. 354, 1905 Miss. LEXIS 44 (Miss. 1905).

A creditor of a county has no access to the circuit court until after his claim has been rejected by the supervisors; if the board disallow his claim he can appeal or he may sue directly in any court of competent jurisdiction. *Board of Supervisors v. Brookhaven*, 51 Miss. 68, 1875 Miss. LEXIS 13 (Miss. 1875); *Taylor v. Marion County*, 51 Miss. 731, 1875 Miss. LEXIS 100 (Miss. 1875).

8. Particular matters as appealable.

Appeals from the initial extension of an option agreement and the conveyance of

city property were timely under Miss. Code Ann. § 11-51-75 because both actions extended beyond an earlier resolution and option agreement. *Ball v. Mayor & Bd. of Aldermen*, 983 So. 2d 295, 2008 Miss. LEXIS 184 (Miss. 2008).

A mayor's veto is an appealable action of a municipal authority as contemplated by the statute. *City of Madison v. Shanks*, 793 So. 2d 576, 2000 Miss. LEXIS 183 (Miss. 2000).

In action by registered voters against county board of supervisors alleging that board violated due process right by refusing to hold election on bond issues, refusal did not rise to level of constitutional deprivation, and even if board members, as alleged, improperly eliminated signatures on plaintiffs' protest petition or viewed required number of signatures too restrictively, proper avenue for such claims was through state election procedures, not action in federal court. *Thrasher v. Board of Supervisors*, 765 F. Supp. 896, 1991 U.S. Dist. LEXIS 7289 (N.D. Miss. 1991).

Statute, directing that appeals from judgments or decisions of municipal authorities are to be taken to Circuit Court, provided exclusive remedy for plaintiff, seeking declaratory and injunctive relief and alleging election regarding use, possession and sale of alcoholic beverages within city was without legal authority, and thus, Chancery Court lacked subject matter jurisdiction over plaintiff's action, even though election was not complete before plaintiff filed complaint, where remedy from city's action of holding election was provided for in Circuit Court. *Benedict v. City of Hattiesburg*, 693 So. 2d 377, 1997 Miss. LEXIS 161 (Miss. 1997).

Any act of county or municipality leaving party aggrieved is appealable to circuit court when all issues of controversy are finally disposed of by order of city council. *Garrard v. City of Ocean Springs*, 672 So. 2d 736, 1996 Miss. LEXIS 135 (Miss. 1996).

City council's decision to transfer property to park commission was appealable; order was final resolution of controversy as to disposition of property. *Garrard v. City of Ocean Springs*, 672 So. 2d 736, 1996 Miss. LEXIS 135 (Miss. 1996).

Any act of a county or municipality which leaves a party aggrieved is appeal-

able under § 11-51-75, which provides for appeal from a "judgment or decision" of the board of supervisors or municipal authorities of a city, town or village, where all issues of the controversy are finally disposed of by order of the city council. Thus, a city council's award of a lease contract for golf carts was an appealable action under § 11-51-75. *South Cent. Turf, Inc. v. Jackson*, 526 So. 2d 558, 1988 Miss. LEXIS 290 (Miss. 1988).

The circuit court acted within its jurisdiction in reversing a rezoning ordinance of the city of Oxford which rezoned 8.33 acres from agricultural to multi-family residential and such decision of the circuit court would be affirmed where the building of low-rent housing and a recreational facility as well as a road expansion had been changes in accordance with the original zoning plan and where there had been no concrete evidence of public need for housing on the 8.33 acres sought to be rezoned, but only testimony that there was generally a public need for multi-family dwellings in the city. *City of Oxford v. Inman*, 405 So. 2d 111, 1981 Miss. LEXIS 2242 (Miss. 1981).

Order prescribing hours of opening and closing of places for sale of beer or wine outside the municipality in the county, under Code 1942, § 10224, is appealable under this section [Code 1942, § 1195]. *Board of Sup'rs v. McCormick*, 207 Miss. 216, 42 So. 2d 177, 1949 Miss. LEXIS 331 (Miss. 1949).

Order of board of supervisors excluding traffic in light wines and beer pursuant to election had is a final order from which an appeal lies. *Costas v. Board of Sup'rs*, 196 Miss. 104, 15 So. 2d 365, 1943 Miss. LEXIS 6 (Miss. 1943).

Order of county board of supervisors providing for election to determine whether sales of beer and light wines should be abolished held appealable by certiorari. *Mohundro v. Board of Sup'rs*, 174 Miss. 512, 165 So. 124, 1936 Miss. LEXIS 194 (Miss. 1936).

Issues arising under law relating to objections to improvements by majority of property owners are appealable. *Faison v. Indianola*, 156 Miss. 872, 127 So. 558, 1930 Miss. LEXIS 232 (Miss. 1930).

Decision of board of supervisors denying petitioners for increase in school tax right

to withdraw, can be questioned only on an appeal to the circuit court. *Havens v. Brown*, 132 Miss. 747, 96 So. 405, 1923 Miss. LEXIS 59 (Miss. 1923).

This section [Code 1942, § 1195] has no application to an appeal to the circuit court from the judgment of municipal authorities changing the boundaries of a municipality. *Yerger v. Greenwood*, 77 Miss. 378, 27 So. 620, 1899 Miss. LEXIS 89 (Miss. 1899).

9. Questions presented for review.

Decision to reverse the denial of a petition for rezoning from residential to commercial under Miss. Code Ann. § 11-51-75 was reversed on appeal because the issue of whether a change in the community had occurred was fairly debatable, and there was no evidence that the decision was arbitrary, capricious, or unsupported by substantial evidence; as such, the trial court overreached the applicable standard of appellate review of a decision from a mayor and board of aldermen. *Mayor & Bd. of Alderman v. Estate of Lewis*, 2006 Miss. App. LEXIS 887 (Miss. Ct. App. Nov. 28, 2006).

An appeal from a board of supervisors or city by a bill of exceptions is an appeal to an appellate court, and the circuit court is bound by the record made before the board. *Thornton v. Wayne County Election Com.*, 272 So. 2d 298, 1973 Miss. LEXIS 1528 (Miss. 1973); *Tally v. Board of Supervisors*, 323 So. 2d 547, 1975 Miss. LEXIS 1566 (Miss. 1975).

Where a determinative vote on a resolution, directing the dismissal of the city's suit to recover losses resulting from budget excesses, illegal expenditures and failure to keep proper records by officials of the city, was cast by one of the officials sued, the resolution was void, not only as to the voting city official but as to the other defendant as well. *Freidhof v. Biloxi*, 232 Miss. 20, 97 So. 2d 742, 1957 Miss. LEXIS 440 (Miss. 1957).

Appeal from decision of Board of Supervisors on legislative or administrative matters is within the contemplation of this section [Code 1942, § 1195] but such appeal is limited to whether or not the order is reasonable and proper or is arbitrary or capricious, or beyond the power of

the board to make, or whether it violates any constitutional right of the complaining party. *Board of Sup'rs v. McCormick*, 207 Miss. 216, 42 So. 2d 177, 1949 Miss. LEXIS 331 (Miss. 1949).

In proceeding to close road, where question whether road was private rather than public road was not raised or passed upon by county board of supervisors or circuit court, issue could not be considered in Supreme Court. *Byrd v. Board of Sup'rs*, 179 Miss. 889, 176 So. 910 (Miss. 1937).

10. Proceedings on appeal.

In an election contest filed by a mayor's opponent, the mayor's certification of a bill of exceptions did not estop the mayor from raising legal arguments on appeal not found in the bill of exceptions because the mayor's certification did not confess the opponent's legal arguments. *McAdams v. Perkins*, 204 So. 3d 1257, 2016 Miss. LEXIS 506 (Miss. 2016).

Circuit court sitting as an appellate court under Miss. Code § 11-51-75 has no power to grant an injunction; if it is necessary to delay implementation of a municipality's order pending the circuit court's ruling on a bill of exceptions, the proper remedy is issuance of a stay under Miss. R. Civ. P. 62. *Falco Lime, Inc. v. Mayor & Aldermen of Vicksburg*, 836 So. 2d 711, 2002 Miss. LEXIS 314 (Miss. 2002).

A city was not entitled to a jury trial in the Circuit Court where the court was sitting as an appellate court pursuant to § 11-51-75 and where the cause of action at issue derived from statutory, rather than common, law. *City of Durant v. Laws Constr. Co.*, 721 So. 2d 598, 1998 Miss. LEXIS 391 (Miss. 1998).

The Circuit Court, sitting as an appellate court pursuant to the statute, without a jury, may award and determine compensatory damages and attorney's fees. *City of Durant v. Laws Constr. Co.*, 721 So. 2d 598, 1998 Miss. LEXIS 391 (Miss. 1998).

A circuit court order remanding a rezoning case to the city council for a determination of the number and percentage of eligible property owners who protested the zoning change and ordering that a report of its findings and conclusions be filed with the court clerk to become part of

the record was not intended to constitute a final judgment contemplated by § 11-51-75, but, rather, the circuit court, sitting as an appellate court, retained jurisdiction pending record expansion and supplementation. *City of Biloxi v. Hilbert*, 597 So. 2d 1276, 1992 Miss. LEXIS 150 (Miss. 1992).

Any court in state sitting as appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon court's invitation, and upon timely application any such third party should be permitted to intervene if that party claims interest relating to property or transaction which is subject of appeal and is so situated that disposition of appeal may as practical matter impair or impede his ability to protect that interest, unless that party's interest is adequately represented by existing party; parties other than original parties to appeal may participate in appellate process by filing *amicus curiae* at request of court or by leave of court; motion for leave to file *amicus* brief should demonstrate (1) *amicus* has interest in some other case involving similar question, or (2) counsel for a party is inadequate or brief insufficient, or (3) there are matters of fact or law which might otherwise escape court's attention, or (4) *amicus* has substantial legitimate interests that will likely be affected by outcome of case and which interest will not be adequately protected by those already parties. *Cooper v. Picayune*, 511 So. 2d 922, 1987 Miss. LEXIS 2677 (Miss. 1987).

An appeal cannot be heard on oral testimony by agreement of the parties, whether or not confined to witnesses examined before the municipal authorities. *City of Greenwood v. Henderson*, 84 Miss. 802, 37 So. 745, 1904 Miss. LEXIS 98 (Miss. 1904).

11. Disposition of appeal.

Trial court properly remanded to the board of supervisors to provide a caterer with a due-process hearing and to consider evidence to determine if its prior contract rescission was justified because a supplementation of the factual basis of the board's justification after the hearing was required to allow for judicial review of the

board's decision. *Howell v. Bd. of Supervisors*, 179 So. 3d 34, 2015 Miss. App. LEXIS 187 (Miss. Ct. App.), cert. denied, 178 So. 3d 729, 2015 Miss. LEXIS 566 (Miss. 2015).

Circuit court properly ruled that a contractor's appeal of the decision of a county board of supervisors to award a contract to another was moot because the circuit court gave the board an opportunity to decide that it would reject all previous bids and reopen the request-for-proposals process, and the board decided to reject all bids and reopen the request-for-proposals process; any error that resulted from the circuit court's decision to remand for reconsideration of the matter by the board was harmless because the circuit court could have ordered the board to reject all bids and reopen the request-for-proposals process. *Precision Communs., Inc. v. Hinds County*, 74 So. 3d 366, 2011 Miss. App. LEXIS 252 (Miss. Ct. App.), cert. denied, 73 So. 3d 1168, 2011 Miss. LEXIS 548 (Miss. 2011).

County board of supervisors' consideration of a local company's promise to employ local residents and provide special services to the elderly in awarding a contract for solid waste disposal, when it had failed to include them in the request for proposals, was a violation of Miss. Code Ann. § 31-7-13(r), requiring the bid process to be reinitiated. Because the remedy of reinitiating the bid process was authorized under § 31-7-13, it was properly ordered under Miss. Code Ann. '11-51-75. *Preferred Transp. Co., LLC v. Claiborne County Bd. of Supervisors*, 32 So. 3d 549, 2010 Miss. App. LEXIS 170 (Miss. Ct. App. 2010).

The party relying on the $\frac{2}{3}$ majority voting requirement of § 17-1-17 has the burden of proving that 20 percent or more of the protesting landowners fit within the class of landowners outlined in the statute, and this showing must be made before the local governing body and not for the first time on appeal; thus, the circuit court's remand of a rezoning case to the city council for the purpose of applying the enhanced voting requirements of § 17-1-17 was unwarranted where the applicability of § 17-1-17 was not raised until the appeal was taken to the circuit court, and

the circuit court erroneously placed upon the city council the burden of satisfying the requirements of § 17-1-17, as it was up to the protesting landowners to affirmatively show that they were within the statutory class who could validly object. *City of Biloxi v. Hilbert*, 597 So. 2d 1276, 1992 Miss. LEXIS 150 (Miss. 1992).

The manifest error doctrine did not apply to an appeal from a decision by the board of supervisors as the appellants had no access to a jury trial and, therefore, should not be held to the manifest error standard. *Leigh v. Board of Supervisors*, 525 So. 2d 1326, 1988 Miss. LEXIS 265 (Miss. 1988).

In a proceeding to review the discharge for cause of a fire fighter, the circuit court improperly modified the Civil Service Commission's decision by entry of an additur or remand to the commission, where, absent certain inadmissible judicially noticed statistical data erroneously considered by the Commission, the fire fighter's evidence as to his earnings and what he reasonably should have earned was not substantially contradicted and therefore the circuit court should have reversed the Commission's order and rendered the fire fighter a judgment for his back pay due him less the total of what, accordingly to relevant and properly adduced evidence, he earned and reasonably should have earned after he was terminated. *Eidt v. Natchez*, 421 So. 2d 1225, 1982 Miss. LEXIS 2276 (Miss. 1982).

The Circuit Court can only consider the case as made by the bill of exceptions, and if the bill is not complete and is fatally defective in that pertinent and important facts and documents are omitted therefrom, the court does not have a record upon which it can intelligently act and the appeal must be dismissed. *Stewart v. Pascagoula*, 206 So. 2d 325, 1968 Miss. LEXIS 1563 (Miss. 1968).

Where, upon appeal, the circuit judge correctly reversed the action of the mayor and board of supervisors in dismissing a petition asking that an election be held to determine whether or not beer could be lawfully sold in the city, it was error to fail to enter a judgment directing the mayor and the board of aldermen to call an election in accordance with Code 1942,

§ 10208.5. *Lee County Drys v. Anderson*, 231 Miss. 222, 95 So. 2d 224, 1957 Miss. LEXIS 508 (Miss. 1957).

An appeal from an order of the board of supervisors authorizing a loan prayed for and affirmed by a school board for the construction of a building and the repair of others should not have been dismissed, but should have been either affirmed or reversed. *White v. Board of Supervisors*, 192 Miss. 327, 5 So. 2d 233, 1941 Miss. LEXIS 34 (Miss. 1941).

Where one convicted in a mayor's court appeals to the circuit court, but fails to appear, the court should dismiss the appeal and direct a procedendo to the mayor. *Henning v. Greenville*, 69 Miss. 214, 12 So. 559, 1891 Miss. LEXIS 119 (Miss. 1891).

If he appeals from such dismissal to the Supreme Court, he cannot assign for error defects in the affidavit, or complain that the circuit court refused in his absence to inquire into his guilt on the merits. *Henning v. Greenville*, 69 Miss. 214, 12 So. 559, 1891 Miss. LEXIS 119 (Miss. 1891).

12. Other remedies.

Trial court did not err in reversing a board's decision denying a county's request for a special exception and granting the request, as the board's decision was not supported by substantial evidence and the court had the authority to implement the decision the board should have made. *Mayor & Bd. of Aldermen v. Jefferson Davis County*, 874 So. 2d 962, 2004 Miss. LEXIS 647 (Miss. 2004).

Inadequacy of the remedy at law is the basis upon which the power of injunction is exercised; an injunction will not issue when the complainants have a complete and adequate remedy by appeal. Thus, a county supervisor's request for injunctive relief from the board of supervisor's ruling that the county supervisor was no longer a resident of the electing district and declaring the office vacant, was properly denied since the statutory method of appeal to the circuit court under § 11-51-75 afforded the county supervisor a plain, adequate, speedy, and complete remedy for a judicial determination of his right. *Moore v. Sanders*, 558 So. 2d 1383, 1990 Miss. LEXIS 154 (Miss. 1990).

Although persons aggrieved by the action or decision of municipal authorities may appeal pursuant to this section, it provided no authority for aggrieved persons to petition municipal authorities for rehearing a zoning ordinance adopted by the municipal authorities; thus, a city council had no authority to remand a petition to rezone property to its planning board for a rehearing after the city council had adopted an ordinance rezoning the property and after an appeal contesting the rezoning had been perfected in the circuit court. *Gatlin v. Cook*, 380 So. 2d 236, 1980 Miss. LEXIS 1826 (Miss. 1980), but see *Griffin v. Armana*, 679 So. 2d 1049, 1996 Miss. LEXIS 298 (Miss. 1996).

Where, following the entry of an order refusing a building permit for the construction of a building which would in all respects conform to the applicable laws, ordinances, and regulations, the city authorities failed for some 60 days to sign or file a bill of exceptions, the result was an unreasonable and unwarranted delay in the issuance of the permit, effectively depriving the applicants of a plain, speedy, adequate remedy in the ordinary course of law; and a writ of mandamus was properly granted directing the issuance of the permit. *Thompson v. Mayfield*, 204 So. 2d 878, 1967 Miss. LEXIS 1227 (Miss. 1967).

The remedy by a writ of prohibition does not lie where there is a plain, adequate and speedy remedy in the ordinary course of the law and a writ of prohibition will not be issued to an inferior court unless its attention has been called to the claimed lack or excess of jurisdiction. *Wilby v. Board of Supervisors*, 226 Miss. 744, 85 So. 2d 195, 1956 Miss. LEXIS 458 (Miss. 1956).

When board of supervisors, acting under Code 1942, § 6370, providing that on petition of majority of qualified electors residing in consolidated school district board may issue bonds for such district for purposes therein set out, rejects such petition for reasons it deems sufficient, or for no reason at all, without adjudicating necessary jurisdictional facts to exist, remedy of petitioners is appeal to circuit court under this section [Code 1942, § 1195] and not writ of mandamus under Code 1942, § 1109, on which appeal petitioners

can obtain in circuit court adjudication of all jurisdictional facts which are alleged to have existed by having embodied such facts in bill of exceptions. *Board of Sup'rs v. State*, 205 Miss. 43, 38 So. 2d 314, 1949 Miss. LEXIS 410 (Miss. 1949).

Where election commissioners certified to a Board of Supervisors the essential matters necessary for the issuance of bonds of a school district, and had determined all the jurisdictional facts essential to the validity of the election, and the Board of Supervisors had found all the jurisdictional facts essential to the issuance of the bond and had directed their issuance and validation, the pendency of a mandamus suit in the circuit court was no bar to a validation proceeding in chancery court, where no appeal was taken from the order of the Board of Supervisors to the circuit court, a mandamus suit being no substitute for the appeal provided by statute. *In re Validation of Bonds*, 185 Miss. 864, 188 So. 318, 1939 Miss. LEXIS 168 (Miss. 1939).

Taxpayer instituting direct suit against municipality to recover privilege taxes abandoned statutory proceeding. *Chasaniol v. Greenwood*, 166 Miss. 770, 144 So. 548, 1932 Miss. LEXIS 309 (Miss. 1932).

It is the duty of persons claiming to have been illegally assessed to avail themselves of the statutory remedy before applying to a Federal court for relief. *First Nat'l Bank v. Gildart*, 64 F.2d 873, 1933 U.S. App. LEXIS 4241 (5th Cir. Miss.), cert. denied, 290 U.S. 631, 54 S. Ct. 50, 78 L. Ed. 549, 1933 U.S. LEXIS 616 (U.S. 1933).

Mandamus will not lie to compel board of supervisors to issue bonds for construction of roads, since this section [Code 1942, § 1195] (Code 1906, § 80) provides for an appeal to the circuit court. *Robinson v. Board of Sup'rs*, 105 Miss. 90, 62 So. 3, 1913 Miss. LEXIS 185 (Miss. 1913); *Board of Sup'rs v. Lee*, 147 Miss. 99, 113 So. 194, 1927 Miss. LEXIS 334 (Miss. 1927).

On rejection of claim by municipal authorities the claimant is entitled to bring an original suit, and is not bound to pursue the remedy prescribed by this section [Code 1942, § 1195]. *Pylant v. Purvis*, 87

Miss. 433, 40 So. 7, 1905 Miss. LEXIS 165 (Miss. 1905).

13. Standing.

Plaintiff citizens had no standing to seek redress for a city board's illegal decision in rehiring a patrolman under Miss. Code Ann. § 11-51-75 because they had not alleged an injury separate and apart from that suffered by other citizens. *Aldridge v. West*, 929 So. 2d 298, 2006 Miss. LEXIS 266 (Miss. 2006).

In the context of standing, while any person may file a complaint with the Mississippi Ethics Commission under Mississippi law, only local district attorneys, the Mississippi Attorney General, or the Commission itself may file direct actions in court challenging the ethical conduct of public officials. As a result, where the parents sought reversal of the confirmations of two school board members by the city council, alleging that certain council members were required to have recused themselves due to conflicts of interest, the parents were not "persons aggrieved" for purposes of Miss. Code Ann. § 11-51-75, and they did not meet the statutory requirements to file a bill of exceptions under the facts presented; their sole remedy was to file a complaint with the Commission. *City of Jackson v. Greene*, 869 So. 2d 1020, 2004 Miss. LEXIS 337 (Miss. 2004).

14. Jurisdiction.

Circuit court properly dismissed a neighbor for lack of personal and subject-matter jurisdiction because the owner improperly added the neighbor as a party to his appeal; the circuit court lacked personal jurisdiction over the neighbor and lacked subject matter jurisdiction over the owner's claims because the neighbor was not aggrieved by the board's decision, and he never participated in the matter before the board. *Wirtz v. Adams Cty. Bd. of Supervisors*, — So. 3d —, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. Apr. 16, 2019).

Because the time-bar in Miss. Code Ann. § 11-51-75 was inapplicable to appellee, the trial court did not err in failing to dismiss for lack of jurisdiction. Appellee's failure to appeal under § 11-51-75 did not deprive the circuit court of jurisdiction because appellee was not provided

adequate notice of the condemnation hearing. *City of Jackson v. Jordan*, 202 So. 3d 199, 2016 Miss. LEXIS 347 (Miss. 2016).

Circuit court erred in granting summary judgment for a city in a property owner's action alleging that the city improperly rezoned her commercial property to residential because a genuine dispute of material facts existed, and the owner could meet an exception to the requirement of exhausting her administrative; if the city unconstitutionally rezoned the property, any attempt to rezone would be unnecessary, as any unconstitutional rezoning was void. *Durr v. City of Picayune*, 185 So. 3d 1042, 2015 Miss. App. LEXIS 362 (Miss. Ct. App. 2015), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 89 (Miss. 2016).

Appellate court affirmed the grant of summary judgment in favor of the city as the trial court did not have subject matter jurisdiction due to the firefighter's failure to exhaust his administrative remedies as required by Miss. Code Ann. § 11-51-75. *Pratt v. City of Greenville*, 918 So. 2d 81, 2006 Miss. App. LEXIS 7 (Miss. Ct. App. 2006).

15. Evidence.

Chancellors do not have discretion in admitting and/or considering relevant evidence in the context of the statute for determining the validity of bond issues; therefore, a chancellor erred by finding that the time had passed for the presentation of evidence as to the sufficiency of the signatures on the petition. Not only was it the correct time for presenting evidence of the sufficiency of the signatures on the petition, it was the only time. *Russell v. Humphreys Cnty. Bd. of Supervisors* (In re Validation of Tax Anticipation Note), 187 So. 3d 1025, 2016 Miss. LEXIS 138 (Miss. 2016).

16. Res judicata.

Adult entertainment club operator's claims against various county defendants, arising from the denial of its request for an exemption from an ordinance that restricted its business hours, were barred by res judicata because the four identities and a final judgment existed in a state

court action raising similar claims, and there was a full and fair opportunity to litigate the claims. *MEC, Inc. v. Lowndes*

Cty. Bd. of Supervisors, 759 Fed. Appx. 331, 2019 U.S. App. LEXIS 1027 (5th Cir. Miss. 2019).

OPINIONS OF THE ATTORNEY GENERAL

The deadline for filing an appeal from the decision of the Mayor and Board of Aldermen under Section 17-1-17 is 10 days because any party aggrieved by the

decision of the governing authorities may appeal the decision to circuit court within 10 days under Section 11-51-75. *Peoples*, June 14, 1995, A.G. Op. #95-0359.

RESEARCH REFERENCES

ALR.

Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 A.L.R.4th 1130.

CJS.

4 C.J.S., Appeal and Error §§ 1, 41, 43-50, 54, 56-85.

Am. Jur.

4 Am. Jur. 2d (Rev), Appellate Review §§ 73, 74.

§ 11-51-77. Appeal from assessment of taxes — Attorney General, district attorney, county attorney may appeal.

(1) Any person aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town or village, as to the assessment of taxes, may, within ten (10) days after the adjournment of the meeting at which such decision is made, appeal to the circuit court of the county, upon giving bond, with sufficient sureties, in double the amount of the matter in dispute, but never less than One Hundred Dollars (\$100.00), payable to the state, and conditioned to perform the judgment of the circuit court, and to be approved by the clerk of such board, who, upon the filing of such bond, shall make a true copy of any papers on file relating to such controversy, and file such copy certified by him, with said bond, in the office of the clerk of the circuit court, on or before its next term. The controversy shall be tried anew in the circuit court at the first term, and be a preference case, and, if the matter be decided against the person who appealed, judgment shall be rendered on the appeal bond for damages at the rate of ten percent (10%) on the amount in controversy and all costs. If the matter be decided in favor of the person who appealed, judgment in his favor shall be certified to the board of supervisors, or the municipal authorities, as the case may be, which shall conform thereto, and shall pay the costs.

(2) A political subdivision may appeal an assessment of taxes as provided in this subsection (2). Only the county attorney, the district attorney, the Attorney General, or the political subdivision acting through its attorney, if the state, county, municipality or political subdivision be aggrieved by a decision of the board of supervisors or the municipal authorities of a city, town, or village as to the assessment of taxes, may, within twenty (20) days after the adjournment of the meeting at which such decision is made, or within twenty

(20) days after the adjournment of the meeting at which the assessment rolls are corrected in accordance with the instructions of the Department of Revenue, or within twenty (20) days after the adjournment of the meeting of the board of supervisors at which the approval of the roll by the Department of Revenue is entered, appeal to the circuit court of the county in like manner as in the case of any person aggrieved as provided in subsection (1) of this section, except no bond shall be required, and such appeal may be otherwise governed by the provisions of this section.

HISTORY: Codes, 1880, § 504; 1892, § 80; 1906, § 81; Hemingway's 1917, § 61; 1930, § 62; 1942, § 1196; Laws, 1918, ch. 120; Laws, 2018, ch. 431, § 1, eff from and after July 1, 2018.

Amendment Notes — The 2018 amendment divided the former section into (1) and (2) by adding “A political subdivision may appeal an assessment of taxes as provide in this subsection (2). Only” preceding what was the fourth sentence of the section; inserted “(10)” in (1); and in (2), inserted “or the political subdivision acting through its attorney,” and “or political subdivision,” inserted “(20)” three times, and substituted “Department of Revenue” for “State Tax Commission” twice, and “aggrieved as provided in subsection (1) of this section” for “aggrieved as hereinbefore provided.”

Cross References — Appeals of equalizations as final assessments of real and personal property, see § 21-33-39.

Appeals by Commissioner of Revenue, see § 27-3-33.

Appeal from order of board of supervisors approving assessment for former years, see § 27-35-157.

JUDICIAL DECISIONS

ANALYSIS

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1. In general.

Circuit court had jurisdiction under Miss. Code Ann. § 11-51-77 where a taxpayer's bill of exceptions challenged the board of supervisors' compliance with the

mandatory statutory notice requirements, it supplemented the bill of exceptions after the tax was assessed and it paid the tax in protest, and thus, the bill of exceptions was an appeal from a tax assessment. *Tunica Cty. Bd. of Supervisors v. HWCC-Tunica, LLC*, 237 So. 3d 115, 2017 Miss. LEXIS 458 (Miss. 2017).

Cases in which the statute creating the cause of action was silent regarding jury trial have been tried before juries for parts of three centuries. That continued custom and practice is the common law, and it was an inviolate right prior to the adoption of our 1890 Constitution; therefore, the right to a jury trial exists in tax-assessment appeals to circuit court. *Riverboat Corp. v. Harrison Cnty. Bd. of Supervisors*, 198 So. 3d 289, 2016 Miss. LEXIS 291 (Miss. 2016).

2. Validity.

This section [Code 1942, § 1196] does not violate the due process and equal protection clauses of the Constitution by giving the state and county a longer time

in which to appeal than that given the taxpayer. *Robinson Land & Lumber Co. v. Roberson*, 126 Miss. 535, 89 So. 160, 1921 Miss. LEXIS 62 (Miss. 1921).

3. Construction and application generally.

Circuit court erred in finding in favor of a taxpayer in its action challenging the amount of the ad valorem taxes assessed against it because the circuit court lacked subject matter jurisdiction; the taxpayer was required to post a bond in order to appeal the tax assessments, and its failure to post a bond deprived the circuit court of jurisdiction to hear the appeal. *Bd. of Supervisors of Clarke Cty. v. BTH Quitman Hickory, LLC*, 255 So. 3d 1261, 2018 Miss. LEXIS 414 (Miss. 2018).

Section 11-51-77 governs appeals to the circuit court from decisions of a county board of supervisors regarding tax matters, and the statute does not require that a bill of exceptions be filed as a prerequisite to the circuit court obtaining subject matter jurisdiction over such matters. *Lenoir v. Madison County*, 641 So. 2d 1124, 1994 Miss. LEXIS 379 (Miss. 1994).

The penalty under this section [Code 1942, § 1196] should be confined to its specific terms and should be strictly construed. *City of Pascagoula v. Advertiser Pub. Co.*, 226 Miss. 247, 84 So. 2d 157, 1955 Miss. LEXIS 629 (Miss. 1955).

In a taxpayer's suit attacking the validity of a contract between the city and company for professional services by the company in making a detailed appraisal and valuation study of all properties in the city including its replacement, physical and other values, if the taxpayers were aggrieved by tax assessments affecting their property which was based upon valuations made by the city assessor under the contract, they should have sought relief by filing objections with the mayor and the board of aldermen and by appealing from such assessments in the manner provided by the statute. *Alexander v. Mayor & Board of Aldermen*, 219 Miss. 78, 68 So. 2d 434, 1953 Miss. LEXIS 372 (Miss. 1953), modified, 220 Miss. 207, 70 So. 2d 529, 1954 Miss. LEXIS 427 (Miss. 1954).

The validity of city tax assessment, where city court denied the petition but it

was not requested to apply this section [Code 1942, § 1196] allowing damages for unsuccessful appeal in such cases, no cross appeal or cross assignment of error was filed on appeal to Supreme Court and the issue of statutory damages was not raised in brief or by suggestion of error to Supreme Court's affirmance of judgment, the Supreme Court would not consider a motion to correct judgment to include statutory damages for unsuccessful appeal. *McArdle's Estate v. Jackson*, 215 Miss. 571, 61 So. 2d 400, 1952 Miss. LEXIS 600 (Miss. 1952).

Right to appeal from refusal of board of supervisors to levy tax for school district is not a "speedy remedy" within meaning of Code 1942, § 1109, so as to bar issuance of writ of mandamus. *State ex rel. Chatham v. Bd. of Supervisors*, 209 Miss. 79, 46 So. 2d 73, 1950 Miss. LEXIS 363 (Miss. 1950).

Remedy of one who is party to proceedings before board of supervisors and is aggrieved by its decision is by appeal on bill of exceptions to circuit court under this section [Code 1942, § 1196], and if this remedy is not pursued as provided by law, objections to board's decision constitute collateral attack which cannot be maintained. *In re Savannah Special Consol. School Dist.*, 208 Miss. 460, 44 So. 2d 545, 1950 Miss. LEXIS 265 (Miss. 1950).

Since a taxpayer would have been entitled to an appeal to the circuit court and trial de novo therein from an unfavorable decision of the board of supervisors on the question of reduction of ad valorem assessment on his property, and the jury therein would be governed by an instruction that no specific parcel of real estate may be assessed at more than its actual value, the right of the taxpayer in this respect could not be less with respect to a review by the state tax commission of a favorable decision of the board of supervisors, the state tax commission being subject to the same instruction. *Stuart v. Board of Supervisors*, 195 Miss. 1, 11 So. 2d 212, 1943 Miss. LEXIS 115 (Miss. 1943).

Proceedings under this statute are judicial rather than administrative in character and hence a "suit" within the statute relating to removal from state to Federal courts. *City of Hattiesburg v. First Nat'l*

Bank, 8 F. Supp. 157, 1934 U.S. Dist. LEXIS 1322 (D. Miss. 1934).

Circuit court, on appeal from the board of supervisors, as to taxes, has same power as the board. *Knox v. L. N. Dantzler Lumber Co.*, 148 Miss. 834, 114 So. 873, 1927 Miss. LEXIS 94 (Miss. 1927).

Tax Laws are to be construed together in determining when taxpayer has right of appeal to the circuit court. *Moller-Vandenboom Lumber Co. v. Board of Sup'rs*, 135 Miss. 249, 99 So. 823, 1924 Miss. LEXIS 34 (Miss. 1924).

Laws 1916 ch. 98, creating the state board of tax commissioners, does not take property without due process, since an appeal may be taken by the taxpayer. *State ex rel. Forman v. Wheatley*, 113 Miss. 555, 74 So. 427, 1917 Miss. LEXIS 135 (Miss. 1917).

This section (Code 1906, § 81) applies specifically to appeals relating to taxes, while § 80 (Code 1942, § 1195) applies to all other cases. *Kuhn Bros. v. Warren County*, 98 Miss. 879, 54 So. 442, 1910 Miss. LEXIS 137 (Miss. 1910).

This section [Code 1942, § 1196] only regulates appeals from judgments relating to assessments of property for taxation. *Jennings v. Board of Sup'rs*, 79 Miss. 523, 31 So. 107 (Miss. 1901).

The right to apply for a reduction in the valuation of property for taxation as fixed by the board of supervisors is not affected by this section [Code 1942, § 1196]. *Simmons v. Board of Supervisors*, 68 Miss. 37, 8 So. 259, 1890 Miss. LEXIS 4 (Miss. 1890).

4. Failure to appeal, effect of.

Denying a board of supervisors' motion to dismiss an appeal of its decision to assess ad valorem taxes for property the taxpayer leased from an airport was not error as nothing in Miss. Code Ann. §§ 27-35-143, 27-35-93, or 11-51-77 required an application before filing an appeal with the court. *Rankin Cty. Bd. of Supervisors v. Lakeland Income Props., LLC*, 241 So. 3d 1279, 2018 Miss. LEXIS 198 (Miss. 2018).

Where a corporate taxpayer erroneously paid a municipal ad valorem tax assessment on personal property of the taxpayer consigned to a lessee operating

as an exempt free port warehouse under Code 1972 §§ 27-31-51 et seq., the taxpayer's failure to protest the assessment by appeal to the circuit court as provided by Code § 11-51-77 did not constitute a waiver and the corporation was entitled to petition the municipality for refund under Code § 21-33-79 and thereafter appeal the municipal denial of the refund to the circuit court under Code 1972 § 21-33-83. *Jackson v. De Soto, Inc.*, 350 So. 2d 684, 1977 Miss. LEXIS 2229 (Miss. 1977).

Parties are bound by order awarding contract for municipal improvements without appeal therefrom; injunction is not available as to order awarding contract for improvements, where proceedings were not void on their face. *Moore v. Board, etc., of Duck Hill*, 151 Miss. 840, 119 So. 324, 1928 Miss. LEXIS 388 (Miss. 1928).

Taxpayers failing to appeal from an order of the board of supervisors approving an assessment are concluded thereby. *Yazoo Delta Inv. Co. v. Suddoth*, 70 Miss. 416, 12 So. 246, 1892 Miss. LEXIS 109 (Miss. 1892).

If a taxpayer failed to appeal he will not be relieved in equity. *Anderson v. Ingersoll*, 62 Miss. 73, 1884 Miss. LEXIS 21 (Miss. 1884).

5. Persons entitled to appeal.

School district and a city had standing to sue a county board of supervisors to challenge its approval of tax assessments on a company's leasehold interest in property because they experienced an adverse effect from the board's conduct, and that adverse effect was different from that experienced by the general public; both the district and the city had statutory duties associated with the taxes, and their funding was reduced by any allegedly improperly low tax assessment. *Pascagoula-Gautier Sch. Dist. v. Bd. of Supervisors*, 212 So. 3d 742, 2016 Miss. LEXIS 437 (Miss. 2016).

Attorney-general may appeal from assessments without first objecting; on appeal, trial is anew and taxpayer may show overvaluation of property. *Robinson Land & Lumber Co. v. Roberson*, 126 Miss. 535, 89 So. 160, 1921 Miss. LEXIS 62 (Miss. 1921).

Appeal lies from decision of board of supervisors increasing assessor's valuation of property for taxation, though person aggrieved by decision did not object thereto. *Louis Cohn & Bros. v. Lincoln County*, 119 Miss. 718, 81 So. 492, 1919 Miss. LEXIS 48 (Miss. 1919).

6. Payment of taxes, effect of.

Questions involved on taxpayer's appeal to circuit court from municipal assessment of taxes did not become moot, notwithstanding taxpayer while appeal was pending paid taxes under protest. *Grenada Bank v. Moorhead*, 160 Miss. 163, 133 So. 666, 1931 Miss. LEXIS 169 (Miss. 1931).

Taxpayer's payment of assessment under protest does not preclude him from prosecuting appeal from erroneous assessment. *Grenada Bank v. Moorhead*, 160 Miss. 163, 133 So. 666, 1931 Miss. LEXIS 169 (Miss. 1931).

7. Appeal bond.

Hospital that was appealing a circuit court's decision to dismiss its complaint for reduction of assessment on software failed to post the necessary appeal bond required by Miss. Code Ann. § 11-51-77. The hospital's payment of the ad valorem assessment did not excuse the requirement to post a bond. *Natchez Hosp. Co., LLC v. Adams Cty. Bd. of Supervisors*, 238 So. 3d 1162, 2018 Miss. LEXIS 137 (Miss. 2018).

Circuit court erred in finding in favor of a taxpayer in its action challenging the amount of the ad valorem taxes assessed against it because the circuit court lacked subject matter jurisdiction; the taxpayer was required to post a bond in order to appeal the tax assessments, and its failure to post a bond deprived the circuit court of jurisdiction to hear the appeal. *Bd. of Supervisors of Clarke Cty. v. BTH Quitman Hickory, LLC*, 255 So. 3d 1261, 2018 Miss. LEXIS 414 (Miss. 2018).

Appeal bond executed and filed with clerk during session of board of supervisors appealed case from board, although final judgment assessing lands was entered after filing. *Moller-Vonderboom Lumber Co. v. Board of Sup'rs*, 138 Miss. 289, 103 So. 81, 1925 Miss. LEXIS 43 (Miss. 1925).

The remedy of the appellee from an insufficient appeal bond is an order requiring the bond to be made sufficient rather than a preemptory dismissal. *Bank of Oxford v. Board of Sup'rs*, 79 Miss. 152, 29 So. 825 (Miss. 1901).

8. Time for appeal.

Circuit court properly granted summary judgment to a county board of supervisors and denied the leaseholders' request for a declaratory judgment because the leaseholders did not timely lodge an objection to a spike in their ad valorem taxes with the board or present sufficient evidence to establish that they leased the land for agricultural purposes, none of their 2010 assessments varied more than 10 percent from the previous year, and the court order that they cited did not apply to them. *Darden v. Bd. of Supervisors*, 169 So. 3d 913, 2014 Miss. App. LEXIS 91 (Miss. Ct. App. 2014).

Where appellant filed his 1999 notice of appeal with the circuit court beyond the 10-day limitation of former Miss. Code Ann. § 11-51-79 but within the 30-day time limit of Miss. Unif. Cir. & County Ct. Prac. R. 5.04, the court of appeals applied the 30-day time limit because such rules supersede statutes that are in conflict with the rules. *Wolfe v. City of D'Iberville*, 799 So. 2d 142, 2001 Miss. App. LEXIS 409 (Miss. Ct. App. 2001).

City's appeal of decision of county board of supervisors granting bar center property tax exempt status could be brought within 20 days after adjournment of meeting at which decision was made, and did not instead have to be brought within 20 days after board gave final approval to State Tax Commission rolls; therefore, city's appeal was not premature. *Ditto v. Hinds County*, 665 So. 2d 878, 1995 Miss. LEXIS 585 (Miss. 1995).

Three events are sufficient to trigger time within which municipality must file appeal of tax decision of county board of supervisors: adjournment of meeting at which decision is made; adjournment of meeting at which assessment rolls are corrected in accordance with instructions of State Tax Commission; or adjournment of meeting at which approval of roll by State Tax Commission is entered. *Ditto v.*

Hinds County, 665 So. 2d 878, 1995 Miss. LEXIS 585 (Miss. 1995).

Attorney-general aggrieved by decision of board of supervisors equalizing assessment roll, need not appeal till after approval of assessment roll. *Edward Hines Yellow Pine Trustees v. State*, 146 Miss. 101, 112 So. 12, 1927 Miss. LEXIS 236 (Miss. 1927), but see *Ditto v. Hinds County*, 665 So. 2d 878, 1995 Miss. LEXIS 585 (Miss. 1995).

Appeal can only be taken from order finally approving assessment after its approval by state tax commission. *State ex rel. Knox v. Wyoming Mfg. Co.*, 138 Miss. 249, 103 So. 11, 1925 Miss. LEXIS 47 (Miss. 1925).

Appeal from board of supervisors assessing and equalizing taxes does not lie until after the state tax commission has passed on the roll and equalized it with those of other counties; appeal prior to filing of assessment roll with tax commission will be dismissed. *Wilkinson County v. Foster Creek Lumber & Mfg. Co.*, 135 Miss. 616, 100 So. 2, 1924 Miss. LEXIS 40 (Miss. 1924).

Owner of property assessed for taxation may appeal from the assessment finally approved by the tax commission and is not required to appeal until that time. *Mobile & O. R. Co. v. Board of Sup'rs*, 124 Miss. 655, 87 So. 139, 1920 Miss. LEXIS 552 (Miss. 1920).

Motion to dismiss appeal from municipal assessment because not filed within five days after assessment made was properly overruled where the appeal was filed within five days after the assessment roll was approved. *Gloster Compress & Trading Co. v. Gloster*, 115 Miss. 578, 76 So. 550, 1917 Miss. LEXIS 236 (Miss. 1917).

An appeal does not lie from an order directing an assessment until the judgment approving the assessment roll shall have become final. *Madison County v. Frazier*, 78 Miss. 880, 29 So. 765, 1901 Miss. LEXIS 136 (Miss. 1901).

9. Finality of assessment.

Order of mayor and board of aldermen of town, in substance adopting and approving assessment rolls, notwithstanding subsequent order, held final, and

therefore appealable. *Grenada Bank v. Moorhead*, 160 Miss. 163, 133 So. 666, 1931 Miss. LEXIS 169 (Miss. 1931).

Entering on the minutes order of state tax commission approving rolls certified to it by the board, is final assessment from which the taxpayer can appeal. *Marathon Lumber Co. v. State*, 139 Miss. 125, 103 So. 798, 1925 Miss. LEXIS 119 (Miss. 1925).

Assessment rolls ordered to be changed by the state tax commission does not become final until approved by the board of supervisors. *Marathon Lumber Co. v. State*, 139 Miss. 125, 103 So. 798, 1925 Miss. LEXIS 119 (Miss. 1925).

An order directing an assessment is not final until the assessment roll is approved and the board adjourns. *Madison County v. Frazier*, 78 Miss. 880, 29 So. 765, 1901 Miss. LEXIS 136 (Miss. 1901).

10. Effect of appeal.

Where a taxpayer appealed to the circuit court from an assessment by the city of the company's personal property taxes and before the case came on trial de novo in the circuit court, the company filed a motion to dismiss its appeal, the case was not decided against the taxpayer in the circuit court within the meaning of this section [Code 1942, § 1196]. *City of Pascagoula v. Advertiser Pub. Co.*, 226 Miss. 247, 84 So. 2d 157, 1955 Miss. LEXIS 629 (Miss. 1955).

State Revenue Agent cannot recover commissions for delinquent taxes after suit brought to compel payment, but before trial, where an appeal from assessment of such tax was pending. *Harrison County v. Robertson*, 121 Miss. 387, 83 So. 617, 1919 Miss. LEXIS 173 (Miss. 1919); *Robertson v. Harrison County*, 127 Miss. 281, 90 So. 8, 1921 Miss. LEXIS 223 (Miss. 1921).

After the execution of an appeal bond, an appeal by a taxpayer to the circuit court from the judgment of the board of supervisors approving an additional assessment made by the tax collector is not subject to dismissal for failure to pay or tender taxes. *Board of Sup'rs v. Tate*, 78 Miss. 294, 29 So. 74 (Miss. 1900).

11. Questions presented for review.

An appeal from a city assessment covers the entire assessment; one securing de-

duction of fire loss in equalization of his property cannot complain because deduction was made on wrong building. *Redmond v. Jackson*, 143 Miss. 114, 108 So. 444, 1926 Miss. LEXIS 249 (Miss. 1926).

Objection to assessment on ground of exemption precludes company from raising regularity of assessment on appeal. *Adams County v. National Box Co.*, 125 Miss. 598, 88 So. 168, 1921 Miss. LEXIS 146 (Miss. 1921).

One who appeals to the circuit court from a decision of the board of supervisors raising his assessment and is defeated cannot appeal to the Supreme Court from that portion only of the judgment of the circuit court adjudging against him statutory damages and costs. *Wm. Atkinson & Bacot Co. v. Pike County*, 73 Miss. 348, 18 So. 924, 1895 Miss. LEXIS 112 (Miss. 1895).

12. Proceedings on appeal.

Where the owner of property protested the assessment as being too high but the city commissioners rejected the protest and adopted the assessment without change, the burden of proof was on the owner to overturn such assessment on appeal to the circuit court with the attendant right to open and close the argument. *City of Jackson v. McCardle's Estate*, 189 Miss. 781, 198 So. 736, 1940 Miss. LEXIS 161 (Miss. 1940).

Appeal by the attorney-general from assessment of taxes is tried *de novo* in circuit court. *Knox v. L. N. Dantzler Lumber Co.*, 148 Miss. 834, 114 So. 873, 1927 Miss. LEXIS 94 (Miss. 1927).

On appeal from assessment of taxes, circuit court may require production of books and papers showing value of property. *Knox v. L. N. Dantzler Lumber Co.*, 148 Miss. 834, 114 So. 873, 1927 Miss. LEXIS 94 (Miss. 1927).

On appeal from order increasing assessment, error to grant a peremptory instruction in favor of taxpayer, where there is testimony of undervaluation. *Union v. J. R. Buchwalter Lumber Co.*, 136 Miss. 414, 101 So. 561, 1924 Miss. LEXIS 153 (Miss. 1924).

Trial by circuit court on an agreed statement of facts, of appeal from order of board of supervisors reducing or refusing

to reduce an assessment of property for taxation, is trial on merits. *Board of Sup'rs v. Laurel Mills*, 130 Miss. 454, 94 So. 448, 1922 Miss. LEXIS 222 (Miss. 1922).

13. —Evidence.

Circuit court erred in its assessment of a taxpayer's student-housing complex property because the court erroneously adopted the county's true value determination of the property when the income capitalization approach was the best approach for the property as the valuation included the student-housing complex's individual property characteristics and actual income in ascertaining the true value of the property. *TNHYIF REIV GOLF, LLC v. Forrest Cty.*, — So. 3d —, 2018 Miss. App. LEXIS 556 (Miss. Ct. App. Nov. 6, 2018).

That Board of Supervisors placed all cut-over land in the County, except certain swamp lands, at an arbitrary assessment value of \$2.50 per acre, that the greater area of all taxable lands was in such cut-over class assessed at \$2.50 per acre, and that taxpayer's land was so assessed although it was not worth on an average as much as the average of other land in such class, did not warrant the circuit court on appeal to receive in evidence the entire assessment roll of all lands in the county in order to emphasize taxpayer's point, where taxpayer's land was not assessed at more than its true value. *Batson v. Pearl River County*, 204 Miss. 882, 35 So. 2d 712, 1948 Miss. LEXIS 416 (Miss. 1948).

Burden of proof on municipality on appeal from board of equalization increasing taxpayer's assessment above that returned by assessor. *Whittle v. Hattiesburg*, 132 Miss. 808, 96 So. 741, 1923 Miss. LEXIS 78 (Miss. 1923).

14. —Judgment.

In proceeding to review an order of a board of supervisors levying a special county-wide tax for the payment of indebtedness incurred in the purchase of road machinery for the separate use of public road districts, and the refusal of the board to refund tax to taxpayer paying same under protest, in which the taxpayer filed

a brief supporting its claim to a refund of the tax, failure of county's attorney to file a brief is tantamount to a confession of error and warrants judgment for the taxpayer. *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 13 So. 2d 644, 1943 Miss. LEXIS 107 (Miss. 1943).

A substantial increase, by virtue of a judgment of the circuit court on appeal by the Attorney General from the assessment adjudicated by the Board of Supervisors of the county and the State Tax Commission, of the assessment of the taxpayers' land over what similar lands of other taxpayers generally and systematically were assessed at was a discrimination against the taxpayers and a violation of the constitutional principal of uniformity, irrespective of what percentage of the true value was used as the basis of valuation. *Edward Hines Yellow Pine Trustees v. Stewart*, 46 F.2d 910, 1931 U.S. App. LEXIS 2522 (5th Cir. Miss.), cert. denied, 283 U.S. 861, 51 S. Ct. 654, 75 L. Ed. 1466, 1931 U.S. LEXIS 428 (U.S. 1931).

On appeal of attorney-general from the board of supervisors, judgment increasing assessment should not order payment of his commission. *Edward Hines Yellow Pine Trustees v. State*, 146 Miss. 101, 112 So. 12, 1927 Miss. LEXIS 236 (Miss. 1927), but see *Ditto v. Hinds County*, 665 So. 2d 878, 1995 Miss. LEXIS 585 (Miss. 1995).

Equality of city assessment is equality over city as a whole, and property not assessed at a greater rate than general assessment over city is not assessed beyond its true value, and assessment will be affirmed. *Redmond v. Jackson*, 143 Miss. 114, 108 So. 444, 1926 Miss. LEXIS 249 (Miss. 1926).

Judgment on certiorari reversing judgment of state tax commission is a "final judgment," and the commission is not entitled to appeal therefrom. *Illinois C. R. Co. v. Miller*, 141 Miss. 213, 106 So. 635, 1925 Miss. LEXIS 232 (Miss. 1925).

Record held to show affirmance on merits of order abating assessment. *Miller v. Beltzhoover's Estate*, 141 Miss. 24, 105 So. 751, 1925 Miss. LEXIS 195 (Miss. 1925).

15. —Damages.

Where a protestant appealed the assessment of property taxes in the circuit

court which awarded 10 per cent damages and in supreme court which awarded 5 per cent as provided by the statute, the awards were for damages for unsuccessful appeals and were not a penalty. *Sellers v. Jackson*, 221 Miss. 150, 75 So. 2d 265, 1954 Miss. LEXIS 525 (Miss. 1954).

Where City of Jackson assessed property and there was an appeal to the circuit court which confirmed the assessment, an award giving the city 10 per cent statutory damages for unsuccessful appeal was subject to interest at the rate of 6 per cent from date of judgment until paid. *Sellers v. Jackson*, 221 Miss. 150, 75 So. 2d 265, 1954 Miss. LEXIS 525 (Miss. 1954).

Attorney-general is entitled to 15% on amount recovered in tax assessment appeals. *Jefferson Davis County v. Berry*, 152 Miss. 578, 120 So. 572, 1929 Miss. LEXIS 235 (Miss. 1929).

Ten per cent damages can be recovered, where judgment in circuit court for appellant was reversed on appeal, only by claim or motion in the Supreme Court within the time prescribed to amend or correct judgment, and not by subsequent motion in the circuit court. *Board of Sup'rs v. Foster Creek Lumber & Mfg. Co.*, 138 Miss. 543, 103 So. 482, 1925 Miss. LEXIS 90 (Miss. 1925).

16. — Costs.

Circuit court erred in denying the taxpayers' motion to tax costs because the applicable statute undisputedly mandated that the county board of supervisors pay "the costs," and the civil and appellate rules provided that costs included, inter alia, the premiums paid for cost of super-sedeas bonds. *Gulfport Partners V, L.P. v. Harrison Cty. Bd. of Supervisors & Tal Flurry*, 231 So. 3d 234, 2017 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, — So. 3d —, 2017 Miss. LEXIS 466 (Miss. 2017), cert. denied, — So. 3d —, 2017 Miss. LEXIS 467 (Miss. 2017), cert. denied, — So. 3d —, 2017 Miss. LEXIS 473 (Miss. 2017), cert. denied, — So. 3d —, 2017 Miss. LEXIS 478 (Miss. 2017).

17. Other remedies.

It is the duty of persons claiming to have been illegally assessed to avail themselves of the statutory remedy before ap-

plying to a Federal court for relief. First Nat'l Bank v. Gildart, 64 F.2d 873, 1933 U.S. App. LEXIS 4241 (5th Cir. Miss.), cert. denied, 290 U.S. 631, 54 S. Ct. 50, 78 L. Ed. 549, 1933 U.S. LEXIS 616 (U.S. 1933).

A taxpayer action challenging the assessment of property added to a municipal separate school district and lying outside the municipality could not be maintained as a class action where the claims of the purported class members related to individually owned parcels of real estate separate and distinct from each other; the remedy of each of these persons, as landowners, was by exercising the statutory right of appeal. Thompson v. Anding, 370 So. 2d 1335, 1979 Miss. LEXIS 2031 (Miss. 1979).

Where bank voluntarily paid taxes and did not avail itself of statutory remedies to cure alleged errors, receiver of bank held not entitled to mandamus to compel Attorney-General to approve refund. Selig v. Price, 167 Miss. 612, 142 So. 504, 1932 Miss. LEXIS 204 (Miss. 1932).

Appeal to the circuit court from tax assessment is the exclusive remedy, where

the assessment is valid on its face. Reed v. Norman-Breaux Lumber Co., 149 Miss. 395, 115 So. 724, 1928 Miss. LEXIS 63 (Miss. 1928).

Bill to enjoin attorney-general from appealing from tax assessment cannot be maintained if remedy sought is defensive merely and equally available in suit at law. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Contention that appeal from tax assessment was nullity because not signed by attorney-general or assistants and because not taken within prescribed time does not constitute ground for equitable relief by way of injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

Alleged intention of attorney-general in appeal from tax assessment, to secure 100 per cent assessment as against assessment of 60 per cent as to other property, does not present ground for injunction. Edward Hines Yellow Pine Trustees v. Knox, 144 Miss. 560, 108 So. 907, 1926 Miss. LEXIS 336 (Miss. 1926).

RESEARCH REFERENCES

ALR.

Standing of one taxpayer to complain of underassessment or nonassessment of property of another for state and local taxation. 9 A.L.R.4th 428.

Am. Jur.

4 Am. Jur. 2d (Rev), Appellate Review §§ 73, 74.

CJS.

4 C.J.S., Appeal and Error §§ 1, 43, 44.

§ 11-51-79. Appeals from the county court.

No appeals or certiorari shall be taken from any interlocutory order of the county court, but if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor. Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefor and bond given according to law, except as hereinafter provided. Such appeal shall operate as a supersedeas only when such would be applicable in the case of appeals to the Supreme Court. Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate

court in termtime or in vacation. If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties as is provided in affirmances in the Supreme Court. If prejudicial error be found, the court shall reverse and shall enter judgment or decree in the manner and against like parties and with like penalties as is provided in reversals in the Supreme Court; provided, that if a new trial is granted the cause shall be remanded to the docket of such circuit or chancery court and a new trial be had therein de novo. Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court; provided, however, that the county judge may within said thirty (30) days, for good cause shown by affidavit, extend the time, but in no case exceeding sixty (60) days from the date of the said final judgment or decree. Judgments or decrees of affirmance, except as otherwise hereinafter provided, may be appealed to the Supreme Court under the same rules and regulations and under the same penalties, in case of affirmance, as appertain to appeals from other final judgments or decrees of said courts, but when on appeal from the county court a case has been reversed by the circuit or chancery court there shall be no appeal to the Supreme Court until final judgment or decree in the court to which it has been appealed. When the result of an appeal in the Supreme Court shall be a reversal of the lower court and in all material particulars in effect an affirmance of the judgment or decree of the county court, the mandate may go directly to the county court, otherwise to the proper lower court. Provided, however, that when appeals are taken in felony cases which have been transferred from the circuit court to the county court for trial, and have been there tried, such appeals from the judgment of the county court shall be taken directly to the Supreme Court.

HISTORY: Codes, 1930, § 704; 1942, § 1616; Laws, 1926, ch. 131; Laws, 1932, chs. 140, 256; Laws, 1940, ch. 229; Laws, 1966, ch. 348, § 1; Laws, 2001, ch. 423, § 1, eff from and after July 1, 2001.

Cross References — Appeals in eminent domain cases, see § 11-27-29.

JUDICIAL DECISIONS

ANALYSIS

1. Validity.
2. Jurisdiction.
3. Right and requisites of appeal.
4. Appeals in felony cases transferred to county court.
5. Time for appeal.
6. Matters considered on appeal.
7. Judgments or orders on appeal.
8. —Trial de novo.
9. —Statutory damages or penalties.

1. Validity.

Although the statute provides that interlocutory appeals may not be taken from county court decisions and that certain appeals from county court must be made to the circuit court. Mississippi Supreme Court rules regarding appeals from county court take precedence over the statute. *Clinton Healthcare, LLC v. Atkinson*, — So. 3d —, 2019 Miss. LEXIS 1 (Miss. Jan. 10, 2019).

Where the judgment of the Supreme

Court reversed the circuit court and in effect affirmed the judgment of the county court, the mandate will be issued direct to the county court. *Martin v. Motors Ins. Corp.*, 219 Miss. 473, 68 So. 2d 869, 1954 Miss. LEXIS 354 (Miss. 1954).

This section [Code 1942, § 1616], in providing an appeal from county court to chancery court in equity cases, is valid as against contention that an appeal from an inferior court can be taken only to the circuit court by virtue of § 156 of the Constitution. *W. Horace Williams Co. v. Federal Credit Co.*, 198 Miss. 111, 21 So. 2d 582, 1945 Miss. LEXIS 173 (Miss. 1945).

This section [Code 1942, § 1616] in providing for appeals directly from the county court to the supreme court in felony cases which have been transferred from the circuit court to the county court for trial and tried in the county court is not unconstitutional as a violation of § 172 of the Constitution of 1890, providing for the establishment of inferior courts. *Drummond v. State*, 184 Miss. 738, 185 So. 207, 1938 Miss. LEXIS 316 (Miss. 1938).

2. Jurisdiction.

Medical center's appeal of an order denying its motion for summary judgment on medical negligence claims did not violate the statute; Miss. Unif. Cir. & Cty. R. 4.06 and Miss. R. App. P. 5 conflict with § 11-51-79 regarding interlocutory appeals, and the court's rules trump statutory law. *Jackson HMA, LLC v. Harris*, 242 So. 3d 1, 2018 Miss. LEXIS 51 (Miss. 2018).

Mississippi Rules of Appellate Procedure do not supersede the jurisdictional requirements of Miss. Code Ann. § 11-51-79 (Rev. 2012). Even if they did, the § 11-51-79 requirement comports with the applicable procedural rule, Miss. Unif. Cir. & Cty. R. 5.04, which requires that, in order to perfect an appeal from county to circuit court, the costs of the appeal be paid within 30 days of the entry of the judgment being appealed. *Belmont Holding, LLC v. Davis Monuments, LLC*, 253 So. 3d 323, 2018 Miss. LEXIS 380 (Miss. 2018).

To the extent that *Van Meter v. Alford*, 774 So. 2d 430 (Miss. 2000), may be interpreted as holding that the bond require-

ment under Miss. Code Ann. § 11-51-79 (Rev. 2012) is not jurisdictional, but rather a deficiency under Miss. R. App. P. 2(a)(2), such an interpretation is incorrect. *Belmont Holding, LLC v. Davis Monuments, LLC*, 253 So. 3d 323, 2018 Miss. LEXIS 380 (Miss. 2018).

Circuit court did not err in finding that it was deprived of jurisdiction by an LLC's failure to pay the cost bond within 30 days as mandated by Miss. Code Ann. § 11-51-79 (Rev. 2012) where the Mississippi Rules of Appellate Procedure did not supersede the jurisdictional requirements of § 11-51-79, and even if they did, the § 11-51-79 requirement comported with Miss. Unif. Cir. & Cty. R. 5.04. *Belmont Holding, LLC v. Davis Monuments, LLC*, 253 So. 3d 323, 2018 Miss. LEXIS 380 (Miss. 2018).

On remand, it was of no consequence that one of the consolidated cases originated in county court because Miss. Code Ann. § 11-51-79 required that the replevin and mechanic's lien cases be remanded to the circuit court, not the county court, for further proceedings and consideration of all claims, possession, and enforcement of liens. *Caterpillar Fin. Servs. Corp. v. Burroughs Diesel, Inc.*, 125 So. 3d 659, 2013 Miss. App. LEXIS 175 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 586 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 587 (Miss. 2013).

Appeals in paternity suits are governed exclusively by § 93-9-41, not by § 11-51-79, and such appeals may be made to no other court than the Supreme Court. *Grisham v. Britfield*, 391 So. 2d 107, 1980 Miss. LEXIS 2171 (Miss. 1980).

The filing of an appeal bond within ten days from the entry of judgment in county court is jurisdictional. *Williams v. Michael*, 319 So. 2d 226, 1975 Miss. LEXIS 1476 (Miss. 1975).

The filing of an approved appeal bond within 10 days, unless an extension is granted, is a jurisdictional requirement. *Parkman v. Mississippi State Highway Com.*, 250 So. 2d 637, 1971 Miss. LEXIS 1188 (Miss. 1971).

Where an appeal from county court in equity case was erroneously taken to the circuit court instead of the chancery court

as required by Code 1942, § 1616, and it was too late to appeal anew, circuit court should have transferred case to chancery court under § 157 of the Constitution, and that court erred in overruling a motion therefor and dismissing the appeal. *W. Horace Williams Co. v. Federal Credit Co.*, 198 Miss. 111, 21 So. 2d 582, 1945 Miss. LEXIS 173 (Miss. 1945).

Under statute requiring that appeals from county court to circuit court be made within ten days from entry of final judgment unless county judge extends time, circuit court held not to have jurisdiction where appeal was filed more than ten days after entry of final judgment, in absence of affidavit asking for extension of time, since statute is mandatory. *Flowers v. Trotlos*, 172 Miss. 305, 160 So. 581, 1935 Miss. LEXIS 155 (Miss. 1935).

County court being without jurisdiction to try eminent domain proceeding during vacation, circuit court and Supreme Court on appeal were likewise without jurisdiction. But see Code 1942, § 1604, providing for trial in vacation of eminent domain and unlawful entry and detainer actions. *Mississippi State Highway Dep't v. Haines*, 162 Miss. 216, 139 So. 168, 1932 Miss. LEXIS 121 (Miss. 1932).

3. Right and requisites of appeal.

Failure to post required bond within time prescribed by law is jurisdictional and Circuit Court has no power to hear appeal, although failure to give notice to court reporter is not jurisdictional. *Johnson v. Evans*, 517 So. 2d 570, 1987 Miss. LEXIS 2963 (Miss. 1987).

In an action on an open account in which the defendant's plea in bar was sustained by the county court and the case dismissed, the order of the circuit court reversing the county court, holding that the plea in bar was without merit and setting the case on its docket for trial was not a final judgment from which an appeal to the Supreme Court would lie. *Southern Saw & Mower Distributors, Inc. v. Dolmar North American Corp.*, 317 So. 2d 400, 1975 Miss. LEXIS 1750 (Miss. 1975).

A money judgment of the county court, entered in a replevin action, was an interlocutory judgment from which no appeal to circuit court would lie after an order

had been entered in the trial court granting the issuance of a writ of inquiry to ascertain the value of the property in question, and before a final judgment had been entered. *A. B. Cash Register Co. v. Travelers Reservation Asso.*, 219 So. 2d 147, 1969 Miss. LEXIS 1415 (Miss. 1969).

Where a landlord recovered judgment for rent due and possession of the premises against his tenant and other persons who were claiming to have an interest in lease, the other persons in interest with the tenant and their sureties could prosecute an appeal, even though the tenant did not appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829, 1955 Miss. LEXIS 542 (Miss. 1955).

The application for an appeal is merely formal, the clerk being without the right to refuse it, provided it is accompanied by a proper bond-the only substantial requirement of the statute. *SCHWARTZ v. MCKAY*, 184 Miss. 422, 185 So. 200, 185 So. 811, 1938 Miss. LEXIS 315 (Miss. 1938).

The tender of an appeal bond is in fact a request that it be approved for the purpose of an appeal, and where the bond was filed with and approved by the circuit court clerk, who was also the clerk of the county court, in connection with an appeal from the county court to the circuit court, it was error to dismiss the appeal on the ground that no application therefor had been made. *SCHWARTZ v. MCKAY*, 184 Miss. 422, 185 So. 200, 185 So. 811, 1938 Miss. LEXIS 315 (Miss. 1938).

On appeal from county court to circuit court in eminent domain proceeding, appellants must give notice to stenographer to transcribe notes, as prescribed by statutes relating to court reporters. *Mississippi State Highway Dep't v. Haines*, 162 Miss. 216, 139 So. 168, 1932 Miss. LEXIS 121 (Miss. 1932).

Appeals from county court held not triable in circuit court until stenographer's transcript becomes part of record or time therefor expires. *Lollar v. Greenwood*, 148 Miss. 363, 114 So. 627, 1927 Miss. LEXIS 65 (Miss. 1927).

4. Appeals in felony cases transferred to county court.

A direct appeal from a conviction of forgery in the county court to the supreme

court was proper in view of this statutory provision. *Drummond v. State*, 184 Miss. 738, 185 So. 207, 1938 Miss. LEXIS 316 (Miss. 1938).

Cases transferred from circuit courts to county courts are appealable to circuit courts. *Ex parte Tucker*, 164 Miss. 20, 143 So. 700, 1932 Miss. LEXIS 219 (Miss. 1932).

5. Time for appeal.

The time for appeal ran from the date of entry of an order overruling a motion to set aside summary judgment, rather than the date of the order granting summary judgment, and therefore an appeal was timely pursuant to § 11-51-79 where the appeal bond was paid 6 days after the motion to set aside summary judgment was overruled. *Allen v. Mayer*, 587 So. 2d 255, 1991 Miss. LEXIS 673 (Miss. 1991).

A motion for a new trial, filed during the term of entry of the judgment but 21 days subsequent to the entry, was violative of the statute authorizing appeals from a county court judgment, and should have been dismissed as not timely made, the provisions of the statute being mandatory and jurisdictional. *Mid-Continent Refrigerator Co. v. Doherty*, 232 So. 2d 360, 1970 Miss. LEXIS 1621 (Miss. 1970).

All appeals from the county court to the circuit court, including eminent domain proceedings, must be taken within 10 days from the date of the entry of the final judgment, or such extended time as the county judge may grant. *Garrett v. Mississippi State Highway Com.*, 227 So. 2d 856, 1969 Miss. LEXIS 1376 (Miss. 1969).

Where a sheriff, who had been judged guilty of contempt of court, made no effort to file an appeal bond, and, after the time for an appeal had expired, the county judge directed the issuance of a *capias* pro fine to the coroner, who took the sheriff into custody, whereupon the sheriff petitioned the circuit court for a writ of habeas corpus, which was made returnable before the county judge, the trial judge in the habeas corpus proceedings did not have the power then to permit the sheriff to execute bonds and thereby effectually appeal the contempt judgments to the circuit court of the county. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

Motion to set aside judgment may be made at any time during term at which judgment was entered, the finality of the judgment being thereby suspended and the limitation of the time for appeal beginning when, but not until, the motion is disposed of. *Rogers v. Ziller*, 48 So. 2d 476 (Miss. 1950).

Ten-day limitation on time for appeal from judgment of county court is not applicable to motion to set aside judgment which appears on its face to have been irregularly and improperly entered against garnishee before time allowed for garnishee to answer had expired. *Rogers v. Ziller*, 48 So. 2d 476 (Miss. 1950).

Appeal bond and notice to stenographer on appeal from judgment of county court which were filed within ten days from time order was entered overruling motion for new trial, but not within ten days after rendition of judgment held timely, since motion for new trial extended the judgment until the motion was disposed of and the judgment denying the new trial was a "final judgment." *Laurel Oil & Fertilizer Co. v. McCraw*, 178 Miss. 117, 172 So. 503, 1937 Miss. LEXIS 190 (Miss. 1937).

Under statute requiring that appeals from county court to circuit court be made within ten days from entry of final judgment unless county judge extends time, circuit court held not to have jurisdiction where appeal was filed more than ten days after entry of final judgment, in absence of affidavit asking for extension of time, since statute is mandatory. *Flowers v. Trotlos*, 172 Miss. 305, 160 So. 581, 1935 Miss. LEXIS 155 (Miss. 1935).

Filing motion for new trial in county court over ten days after entry of final judgment, during same term, does not suspend judgment, nor resuscitate right of appeal. *Mutual Health & Ben. Ass'n v. Cranford*, 173 Miss. 152, 156 So. 876, 1934 Miss. LEXIS 387 (Miss. 1934).

Appeals from county to circuit court, including eminent domain proceedings, must be taken within ten days from judgment, or such extended time as county judge may grant. *Mississippi State Highway Dep't v. Haines*, 162 Miss. 216, 139 So. 168, 1932 Miss. LEXIS 121 (Miss. 1932).

6. Matters considered on appeal.

Testimony, taken in the circuit court on

a motion for a new trial and a further motion to set aside the judgment, whereby the circuit court had affirmed the judgment of the county court, tending to show that the note sued upon was executed prior to its alleged date, was wholly incompetent under this section [Code 1942, § 1616], for the reason that the appeal was to be considered solely upon the record as made in the county court, and when so considered, the judgment appealed from should be affirmed if no prejudicial error be found. *Peebles v. Miles*, 189 Miss. 623, 198 So. 29, 1940 Miss. LEXIS 130 (Miss. 1940).

An appellant cannot for the first time on appeal from the county court to the circuit court present a plea supported by proof that appellee was a foreign corporation and had not complied with the statutes of this state authorizing it to do business therein and giving it access to its courts, since the circuit court, sitting as a court of appeals, can consider nothing except the record coming up from the county court. *Carmichael v. J. Cahn Co.*, 183 Miss. 535, 184 So. 417, 1938 Miss. LEXIS 266 (Miss. 1938).

Where evidence warranted punitive damages, question whether they should be inflicted was for county judge trying case without jury, not for circuit judge on appeal. *Ellis v. S. Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273, 1932 Miss. LEXIS 53 (Miss. 1932).

Points not raised by assignments of error in circuit court, other than as to jurisdiction, cannot be raised in Supreme Court on appeal. *State v. Carraway*, 160 Miss. 263, 134 So. 846, 1931 Miss. LEXIS 209 (Miss. 1931).

7. Judgments or orders on appeal.

Where defendant in prosecution in county court for unlawful possession of whisky was entitled to a directed verdict of not guilty, circuit court should have reversed judgment of conviction and discharged defendant, and consequently Supreme Court would reverse judgment of circuit court affirming conviction and would discharge defendant. *Lewis v. State*, 198 Miss. 767, 23 So. 2d 401, 1945 Miss. LEXIS 245 (Miss. 1945).

Where only error in judgment of county court upholding buyer's right to rescind

sale was in providing that, upon default of the seller returning to the buyer the note and conditional sales contract the buyer was entitled to recover from the seller as damages to the face value of the note, with interest at 6 per cent per annum after maturity of each note instalment, instead of simply providing that upon such default the buyer recover the face value thereof, circuit court could make this correction, and consequently on appeal the Supreme Court would make such correction. *Nichols Bus & Trailer Co. v. Fuller*, 198 Miss. 230, 22 So. 2d 243, 1945 Miss. LEXIS 188 (Miss. 1945).

If on appeal prejudicial error is found, it is the duty of the circuit court to reverse the case whereupon this section [Code 1942, § 1616] requires that it be transferred to the issue docket of the circuit court for trial therein de novo; and after such trial de novo the circuit court would be entitled to entertain a motion for a new trial and to hear evidence in support thereof, but not otherwise. *Peebles v. Miles*, 189 Miss. 623, 198 So. 29, 1940 Miss. LEXIS 130 (Miss. 1940).

Under this section [Code 1942, § 1616] the circuit court considers the case on the record made in the county court, and if harmful error is found, grants a trial de novo in the circuit court, and if not, affirms the judgment, an eminent domain proceeding in the county court being in the same category as any other civil cause in that court. *Mississippi State Highway Com. v. Reddoch*, 184 Miss. 302, 186 So. 298, 1939 Miss. LEXIS 53 (Miss. 1939).

Where description of mortgaged property was void because insufficient and record presented no other facts for jury's determination which could affect right of purchaser at bankruptcy sale to recover, Supreme Court reversed judgment for mortgagee and entered final judgment for such purchaser. *National Foods, Inc. v. Friedrich*, 173 Miss. 717, 163 So. 126, 1935 Miss. LEXIS 248 (Miss. 1935).

Circuit court, when affirming money judgment of county court, where appeal bond supersedes judgment, should render judgment on bond for amount of judgment affirmed, with interest thereon from date of rendition at same rate as borne by judgment affirmed, court costs, and six

per cent damages on amount of judgment. *Ellis v. S. Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273, 1932 Miss. LEXIS 53 (Miss. 1932).

Supreme Court, reversing circuit court's judgment which reversed county court's judgment, could render such judgment as circuit court should have rendered. *Ellis v. S. Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273, 1932 Miss. LEXIS 53 (Miss. 1932).

Where Supreme Court reverses circuit court's judgment, and, by rendering contrary judgment, in effect affirms county court judgment, mandate will be issued direct to county court. *Ellis v. S. Pellegrini, Inc.*, 163 Miss. 385, 141 So. 273, 1932 Miss. LEXIS 53 (Miss. 1932).

Supreme Court judgment, affirming circuit court judgment, affirming county court judgment, need not direct circuit court to remand case for enforcement by execution. *Brandon v. Interstate Life & Acci. Co.*, 149 Miss. 814, 116 So. 739, 1928 Miss. LEXIS 99 (Miss. 1928).

8. —Trial de novo.

Because issues regarding the possessory rights of the parties remained unresolved, remand for a new trial on the merits was warranted to determine which party had a superior possessory right, under Miss. Code Ann. §§ 11-37-101 and 85-7-251, to vehicles which a towing company towed from an auto repairman's leased premises at the landlord's direction. *Crowell v. Butts*, 153 So. 3d 719, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. 2013), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 395 (Miss. 2014), aff'd in part and rev'd in part, 153 So. 3d 684, 2014 Miss. LEXIS 530 (Miss. 2014).

Since upon the circuit court's reversal of the county court, based upon the granting of certain erroneous instructions by the county judge, the case became a pending cause on the docket of the circuit court for a new trial de novo, the order of reversal was not such a final judgment as an appeal could lie therefrom. *Allen v. Sowell*, 231 Miss. 597, 97 So. 2d 227, 1957 Miss. LEXIS 542 (Miss. 1957).

A judgment in county court in an unlawful entry and detainer action awarding plaintiff double rent from a fixed date until surrender of premises was properly

affirmed by the circuit court on appeal, without remanding the case to its own docket for a new trial, after striking this provision and substituting the amount which had accrued prior to rendition of judgment. *Stewart v. Miller*, 200 Miss. 188, 26 So. 2d 540, 1946 Miss. LEXIS 281 (Miss. 1946).

Circuit court, in action of replevin on appeal from judgment of county court which failed to hold part of claim was barred by limitations, should reverse and try case de novo. *Blount v. Miller*, 172 Miss. 492, 160 So. 598, 1935 Miss. LEXIS 157 (Miss. 1935).

In replevin against sheriff who seized automobile under unconstitutional provision of taxing statute, where county court, on appeal from justice court, erroneously rendered judgment for defendant, circuit court, on appeal from county court, should have reversed county court's judgment and tried case de novo. *Holloway v. Jordan*, 170 Miss. 99, 154 So. 340, 1934 Miss. LEXIS 116 (Miss. 1934).

On Supreme Court's reversal of circuit court judgment affirming county court judgment, which was in effect reversal of county court judgment, proper course was to remand case to circuit court to try de novo in accordance with statute. *McIntosh v. Munson Road Machinery Co.*, 167 Miss. 546, 145 So. 731, 1933 Miss. LEXIS 82 (Miss. 1933).

Trial on appeal from county court to circuit court in condemnation proceedings is not de novo, but on record and assignments of error. *State v. Carraway*, 160 Miss. 263, 134 So. 846, 1931 Miss. LEXIS 209 (Miss. 1931).

Appeal to circuit court in suit of eminent domain, brought in county court, is not triable de novo on appeal to circuit court, § 1497, Code of 1930 (§ 2766, Code of 1942) not being applicable. *City of Hattiesburg v. Pritchett*, 160 Miss. 342, 134 So. 140, 1931 Miss. LEXIS 181 (Miss. 1931).

9. —Statutory damages or penalties.

A circuit court judge did not exceed his authority by assessing statutory damages of fifteen percent against a party for failure to prosecute its appeal from the county court. *Johnson, Ltd. v. Signa*, 410

So. 2d 1320, 1982 Miss. LEXIS 1879 (Miss. 1982).

Code 1942, § 1616 makes applicable to appeals from county courts damages imposed by Code 1942, § 1971, in the event that judgment or decree of the court below is affirmed or the appellant fails to prosecute his appeal. *Excel Saw & Tool Co. v. Micor Corp.*, 265 So. 2d 926, 1972 Miss. LEXIS 1382 (Miss. 1972).

Court in construing statutes relating to imposition of penalties on unsuccessful appeals must look to substance rather than form. *Hawkins Hardware Co. v. Crews*, 176 Miss. 434, 169 So. 767, 1936 Miss. LEXIS 146 (Miss. 1936).

Where landlord brought suit to recover rent accompanied by an attachment, penalty on affirmance of judgment on landlord's appeal should have been calculated on money judgment recovered by tenant for wrongful suing out of attachment and not on property attached. *Hawkins Hardware Co. v. Crews*, 176 Miss. 434, 169 So. 767, 1936 Miss. LEXIS 146 (Miss. 1936).

County court's money judgment for claimant being affirmed by circuit court and Supreme Court, claimant could recover statutory damages. *Brandon v. Interstate Life & Acci. Co.*, 149 Miss. 814, 116 So. 739, 1928 Miss. LEXIS 99 (Miss. 1928).

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Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief. 45 A.L.R.5th 531.

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4 Am. Jur. 2d (Rev), Appellate Review §§ 75- 109, 155.

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seq., 137, 222 et seq., 213, 230-233, 281, 284, 282, 419-421.

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Mandatory assessment of damages against an unsuccessful appellant: A constitutional analysis, 53 Miss. L. J. 281, June, 1983.

Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification, 22 Miss. C. L. Rev. 57, Fall, 2002.

§ 11-51-81. Appeals to the county court.

All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, but appeals from orders of the board of supervisors, municipal boards, and other tribunals other than courts of justice of the peace and municipal courts, shall be direct to the circuit court as heretofore. And from the final judgment of the county court in a case appealed to it under this section, a further appeal may be taken to the circuit court on the same terms and in the same manner as other appeals from the county court to the circuit court are taken: Provided that where the judgment or record of the justice of the peace, municipal or police court is not properly certified, or is not certified at all, that question must be raised in the county court in the absence of which the defect shall be deemed as waived and by such waiver cured and may not thereafter be raised for the first time in the circuit court on the appeal thereto; and provided further that there shall be no appeal from the circuit court to the Supreme Court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was thence appealed to the county court and thence to the circuit court unless in

the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the Supreme Court.

HISTORY: Codes, 1930, § 705; 1942, § 1617; Laws, 1926, ch. 131.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Municipal police courts and police justices generally, see §§ 21-23-1 et seq.

JUDICIAL DECISIONS

ANALYSIS

1. Constitutionality.
2. Validity.
3. Construction and application generally.
4. Appeal to Supreme Court.
5. —Constitutional question.
6. Judgments or orders on appeal.
6. Appeal dismissed.

1. Constitutionality.

Miss. Code Ann. § 11-51-81's "three-court rule" is unconstitutional because it usurps the Mississippi Supreme Court's constitutional rule-making power and violates the doctrine of separation of powers. Thus, any litigant whose case originates in either justice court or municipal court, and whose case is ultimately decided by the circuit court, whether it be via a trial de novo or on appellate review from a final judgment of the county court conducted by the circuit court under the applicable statute, shall have the right to appeal to the Mississippi Supreme Court. *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

2. Validity.

Provision of this section [Code 1942, § 1617] limiting appeal from circuit court to Supreme Court in cases originating in justice of peace, municipal or police court, held not invalid as denying equal protection of law. *Worley v. Pappas*, 161 Miss. 330, 135 So. 348, 1931 Miss. LEXIS 256 (Miss. 1931).

3. Construction and application generally.

Appellate court had jurisdiction to hear a landlord's appeal as the appeal was from

the tenant's counterclaim that was originally filed in the county court. *Johnson v. Brooks*, 915 So. 2d 536, 2005 Miss. App. LEXIS 970 (Miss. Ct. App. 2005).

Defendant's appeal from his convictions for indecent exposure, reckless driving, and malicious mischief was dismissed as the appeal was not accompanied by the necessary formal allowance of either the circuit judge or a Supreme Court justice as required by Miss. Code Ann. § 11-51-81. *Johnson v. State*, 879 So. 2d 1057, 2004 Miss. App. LEXIS 554 (Miss. Ct. App. 2004), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

Where a landlord brought an action against a tenant and others who were claiming to have an interest in lease for rent owing and possession of premises, and where a judgment was rendered against the tenant and others and their sureties, even though the tenant did not appeal the others in interest with the tenant and their sureties could prosecute an appeal. *Treuting v. Guice*, 224 Miss. 794, 80 So. 2d 829, 1955 Miss. LEXIS 542 (Miss. 1955).

This section [Code 1942, § 1617] expressly applies to criminal as well as to civil cases. *State v. Warren*, 197 Miss. 13, 19 So. 2d 491, 1944 Miss. LEXIS 268 (Miss. 1944), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

A case carried from the court of a justice of the peace to a county court for the purpose of reviewing a judgment is an appeal within the meaning of this section [Code 1942, § 1617] a writ of certiorari being one of the methods by which appel-

late jurisdiction is exercised. *SCHWARTZ v. MCKAY*, 184 Miss. 422, 185 So. 200, 185 So. 811, 1938 Miss. LEXIS 315 (Miss. 1938).

Where appeal bond for less than statutory amount was approved, appeal from justice court to county court was not void but only defective, and county court could enter nonsuit on appellant's motion. *Keys v. Borden*, 178 Miss. 173, 171 So. 887, 1937 Miss. LEXIS 174 (Miss. 1937).

On appeal from justice court to county court, no demand for jury is necessary. *Speir v. Moseley*, 158 Miss. 63, 130 So. 53, 1930 Miss. LEXIS 18 (Miss. 1930).

On appeal from justice to county court, appellant's obtaining delay to week in which cases before court without jury came up held not waiver of jury trial. *Speir v. Moseley*, 158 Miss. 63, 130 So. 53, 1930 Miss. LEXIS 18 (Miss. 1930).

Criminal case in which justice was disqualified because of interest on appeal to county court is tried de novo. *State v. Dearman*, 152 Miss. 6, 118 So. 349, 1928 Miss. LEXIS 204 (Miss. 1928).

4. Appeal to Supreme Court.

Once an appeal is before the Supreme Court under § 11-51-81, it is there for all purposes as the Supreme Court's jurisdiction extends to "appeals," which are entire cases, and not merely isolated or discrete issues therein; however, it is within the discretion of the Supreme Court to decline to consider nonconstitutional issues and restrict review to issues of general importance in the administration of justice, or to protect a party from substantial and irreparable injury. *Goforth v. Ridgeland*, 603 So. 2d 323, 1992 Miss. LEXIS 348 (Miss. 1992).

An appeal to the Supreme Court would be dismissed where the case originated in justice court, was tried de novo in county court and was appealed on the record to the circuit court, and nothing in the record indicated the allowance of the appeal by the circuit judge or by a judge of the Supreme Court. *Davidson v. State*, 592 So. 2d 1006, 1992 Miss. LEXIS 3 (Miss. 1992), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

The requirements under § 11-51-81 that a case originating in municipal court,

appealed to county court and there tried de novo, and from county court appealed to circuit court and by that court affirmed, may not be appealed to the Supreme Court of Mississippi unless (1) a constitutional question is necessarily involved and (2) then only upon the allowance of an appeal by the circuit judge or by a judge of the Supreme Court—are jurisdictional requirements. Thus, an appeal would be dismissed where the record failed to reflect that the appeal was allowed by a circuit judge or by a judge of the Supreme Court and no constitutional violation or constitutional question had been alleged or presented to the Supreme Court for appellate review; the appeal would be dismissed even though the jurisdictional issue was not raised in the appellate briefs, since the Supreme Court has a duty to raise on its own motion a question of jurisdiction of an appeal even though such question is not raised by either party. *Sumrall v. Jackson*, 576 So. 2d 1259, 1991 Miss. LEXIS 94 (Miss. 1991), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

Where a defendant entered a plea of nolo contendere in municipal court and was found guilty, appealed to the county court and, following a trial de novo, was again convicted and sentenced to pay a fine, and thereafter appealed to the circuit court in which the case was heard and the conviction and sentence affirmed, the defendant's appeal to the Supreme Court would be dismissed on the ground that the defendant had failed to present his "constitutional claims" before the circuit court and had therefore precluded appeal to the Supreme Court. *Alt v. Biloxi*, 397 So. 2d 897, 1981 Miss. LEXIS 2005 (Miss. 1981), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

Upon an appeal to the supreme court from the circuit court under this section, only the constitutional question is considered. *Gaughf v. Jackson*, 243 Miss. 50, 137 So. 2d 190, 1962 Miss. LEXIS 312 (Miss. 1962).

The presence of a constitutional question and the granting of an appeal by the circuit judge must concur in order to justify such an appeal to the supreme court.

Wells v. State, 201 Miss. 249, 29 So. 2d 119, 1947 Miss. LEXIS 393 (Miss. 1947), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

An appeal to the Supreme Court will not lie from a misdemeanor conviction in a justice of the peace court which has been appealed to the county court and thence to the circuit court, where no constitutional question is involved. Kitchens v. State, 198 Miss. 346, 22 So. 2d 493, 1945 Miss. LEXIS 204 (Miss. 1945), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

There can be no appeal to Supreme Court in a case originating in justice court and thence appealed to county court and from that court to circuit court, unless a constitutional question is involved. State v. Warren, 197 Miss. 13, 19 So. 2d 491, 1944 Miss. LEXIS 268 (Miss. 1944), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

Supreme Court has no jurisdiction to entertain an appeal from circuit court affirming conviction in county court in a proceeding on charge of operating house of ill fame, which originated in justice court, where no constitutional question is involved and there has been no order by the circuit judge or any judge of Supreme Court allowing the appeal. Keeton v. State, 197 Miss. 11, 19 So. 2d 477, 1944 Miss. LEXIS 267 (Miss. 1944), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

Where a suit on a note commenced in justice of the peace court was by agreement of the parties transferred for trial to the county court, this section [Code 1942, § 1617] did not prevent an appeal to the supreme court from a judgment of the circuit court affirming judgment in the county court, where by reason of such agreement the cause occupied the same status as if it had been first instituted in the county court, and no appeal had been perfected from the justice of the peace court since there had been no judgment to appeal from. Peebles v. Miles, 189 Miss. 623, 198 So. 29, 1940 Miss. LEXIS 130 (Miss. 1940).

If a circuit court wrongfully dismisses an appeal to it from a county court, the appellant has not had his day in the former court which this section [Code 1942, § 1617] contemplates, and consequently it does not bar him from appealing to the supreme court for the correction of that error. SCHWARTZ v. MCKAY, 184 Miss. 422, 185 So. 200, 185 So. 811, 1938 Miss. LEXIS 315 (Miss. 1938).

When a case has been properly appealed from a county court to a circuit court, that court should take jurisdiction thereof and try it in the manner provided by Code 1942, § 704, and it is from judgments then rendered that this section [Code 1942, § 1617] forbids appeals to the supreme court. SCHWARTZ v. MCKAY, 184 Miss. 422, 185 So. 200, 185 So. 811, 1938 Miss. LEXIS 315 (Miss. 1938).

Appeal should be allowed to Supreme Court where defendant's constitutional rights are invaded by admitting evidence obtained by illegal search or where constitutional question is doubtful. Johnson v. Hattiesburg, 170 Miss. 527, 155 So. 418, 1934 Miss. LEXIS 173 (Miss. 1934), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

Appeal in case originating in justice court and appealed to county and circuit courts will be dismissed unless appeal involves constitutional question. Williams v. State, 160 Miss. 489, 135 So. 199, 1931 Miss. LEXIS 215 (Miss. 1931), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

5. —Constitutional question.

Appellate court was procedurally barred from reaching the merits of defendant's non-constitutional issues because the appellate court was limited to issues that involved constitutional questions. Sasser v. City of Richland, 850 So. 2d 206, 2003 Miss. App. LEXIS 627 (Miss. Ct. App. 2003), overruled in part, Jones v. City of Ridgeland, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

A constitutional question is required for an appeal from a municipal court to the Mississippi Supreme Court. Barrett v. State, 491 So. 2d 833, 1986 Miss. LEXIS

2504 (Miss. 1986), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

No constitutional question was presented within Supreme Court's appellate jurisdiction in liquor prosecution claimed to involve illegal search, where defendant, before search of closet, told policeman he was pouring whisky into commode and that closet was public. *Johnson v. Hattiesburg*, 170 Miss. 527, 155 So. 418, 1934 Miss. LEXIS 173 (Miss. 1934), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

6. Judgments or orders on appeal.

A county court's enhancement of a defendant's sentence for breach of the peace from \$50 to \$250 on appeal from the municipal court, was proper since the fine fell within the breach of the peace statute's sentencing guideline and there was no evidence that the enhancement was reflective of judicial vindictiveness. *Jones v. Meridian*, 552 So. 2d 820, 1989 Miss. LEXIS 422 (Miss. 1989).

In replevin against sheriff who seized automobile under unconstitutional provision of taxing statute, where county court, on appeal from justice court, erroneously rendered judgment for defendant, circuit court, on appeal from county court, should have reversed county court's judgment and tried case de novo. *Holloway v. Jordan*, 170 Miss. 99, 154 So. 340, 1934 Miss. LEXIS 116 (Miss. 1934).

Where defendant was tried in county court for removing and concealing personal property on which there was lien, but was convicted of larceny, and court, after hearing evidence in accordance with

circuit court's order on appeal, failed to enter correct judgment, judgment would be reversed, and cause remanded to circuit court for trial de novo. *Wardlaw v. State*, 158 Miss. 400, 130 So. 513, 1930 Miss. LEXIS 70 (Miss. 1930).

6. Appeal dismissed.

Where defendant was convicted of driving under the influence offense, careless driving, and speeding in the Municipal Court of the City of Florence, and the conviction was affirmed by the Rankin County Court and then the Rankin County Circuit Court, no further appeal was permitted pursuant to Miss. Code Ann. § 11-51-81 (Rev. 2002); although a constitutional issue was presented (defendant alleged a denial of equal protection), an appeal was not specifically allowed by either the circuit judge or by a judge of the supreme court. *Estate of Beckley v. Beckley*, 2007 Miss. App. LEXIS 82 (Miss. Ct. App. Jan. 16, 2007).

Appeal was dismissed because it was procedurally barred due to the absence of the second jurisdictional requirement of Miss. Code Ann. § 11-51-81 (2002); the circuit court denied defendant's motion for reconsideration of judgment, or in the alternative, to certify a constitutional question, and there was nothing in the appellate court's file to indicate that defendant presented a request to the Mississippi Supreme Court to allow the appeal, nor that any such request was granted by a justice of the Mississippi Supreme Court. *Withers v. City of Pearl*, 919 So. 2d 1050, 2005 Miss. App. LEXIS 469 (Miss. Ct. App. 2005), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

RESEARCH REFERENCES

Am. Jur.

47 Am. Jur. 2d (Rev.), Justices of the Peace §§ 31 et seq., 32 et seq.

CJS.

51 C.J.S., Justices of the Peace §§ 129 et seq.

§ 11-51-83. Appeals from unlawful entry and detainer court.

Either party aggrieved by the judgment of the justices rendered in a case of unlawful entry and detainer, may, after final judgment, appeal to the circuit court of the county, within five days after the rendition of the judgment, by

entering into bond with sufficient sureties, to be approved by the justice before whom the complaint was made, or in his absence before another justice, who tried the case, in a penalty double the amount of the rent recovered, but never less than Two Hundred Dollars (\$200.00), payable to the opposite party, conditioned for the payment of such judgment as the circuit court may render against him. Such appeal shall operate as a supersedeas. The justice shall send to the circuit court all the papers and proceedings, and a transcript of all orders and judgments in said cause, and shall deliver the same to the clerk of the circuit court, to be there docketed for trial. The circuit court shall, at the first term, hear and determine the cause anew on its merits, in a summary way. On the trial in the circuit court, the plaintiff may claim for all arrears of rent due at the time of such trial, or for the use and occupation of the premises up to that time. The court shall cause judgment to be entered against the defendant and his sureties on the appeal bond, for the amount found to be due, and award a fieri facias thereon, with legal interest and all costs; but the judgment against the surety shall not exceed the penalty of the appeal bond.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 7 (17); 1857, ch. 42, art. 18; 1871, § 1594; 1880, § 2657; 1892, § 81; 1906, § 82; Hemingway's 1917, § 62; 1930, § 63; 1942, § 1197.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Actions for unlawful entry and detainer generally, see §§ 11-25-1 et seq.

Appeals from county court, see § 11-51-79.

Written demand for appeal in lieu of bond in unlawful entry and detainer, see § 11-51-103.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Appeal bond.
3. Time for appeal.
4. Matters determinable on appeal.
5. Jurisdiction.

1. In general.

Where a circuit court affirmed the decision of justice of peace for landlord in a suit to remove tenant for nonpayment of rent, the circuit court properly allowed the landlord rent up to the time of the judgment. *Williams v. Shivers*, 222 Miss. 626, 76 So. 2d 838, 1955 Miss. LEXIS 646 (Miss. 1955).

In an unlawful entry and detainer action where throughout the trial the appellant did not ask for rent, and the case was

submitted to jury without any mention of rent, and no claim for rent was made until after the trial and verdict, and thereby the appellant obtained a distinctive advantage in the presentation of his case to the jury, such an advantage was sufficient to constitute a waiver of claim for rent. *Producers Gin Ass'n (AAL) v. Beck*, 215 Miss. 263, 60 So. 2d 642, 1952 Miss. LEXIS 561 (Miss. 1952).

A judgment is "rendered" when pronounced in open court at conclusion of trial, and not at time it is entered on docket. *Simpson v. Boykin*, 118 Miss. 701, 79 So. 852, 1918 Miss. LEXIS 123 (Miss. 1918), overruled, *Jackson v. Schwartz*, 240 So. 2d 60, 1970 Miss. LEXIS 1267 (Miss. 1970).

An unlawful entry and detainer case upon appeal is tried anew on its merits.

Harvey v. Clark, 81 Miss. 166, 32 So. 906, 1902 Miss. LEXIS 113 (Miss. 1902).

2. Appeal bond.

Circuit court held authorized to permit amendment of \$100 appeal bond from unlawful entry and detainer court to meet statutory requirement for appeal bond of not less than \$200, or to permit execution of new bond. Williams v. Johnson, 175 Miss. 419, 167 So. 639, 1936 Miss. LEXIS 67 (Miss. 1936).

Defendant's bond on appeal from unlawful entry and detainer court to circuit court did not obligate sureties to pay costs of plaintiff's appeal to Supreme Court from circuit court's judgment for defendant, resulting in reversal and remand. Cahn v. Wright, 119 Miss. 107, 80 So. 494, 1918 Miss. LEXIS 16 (Miss. 1918).

If the bond state the date of the judgment as subsequent to its own date, the defect can be cured by amendment or by giving a new bond. Leavenworth v. Crittenden, 62 Miss. 573, 1885 Miss. LEXIS 111 (Miss. 1885).

The bond must conform substantially to the statute. Warren v. Trustees of African Baptist Church, 50 Miss. 223, 1874 Miss. LEXIS 48 (Miss. 1874).

Objection to an appeal bond from the justice's court must be made in the circuit court, they cannot be raised for the first time in the Supreme Court. Poston v. MHOON, 49 Miss. 620, 1873 Miss. LEXIS 154 (Miss. 1873).

The appeal taken after judgment is not a matter which can appear in the record of the special tribunal; it is sufficient if the appeal bond appear to have been executed and approved within five days after the rendition of the judgment. Busby v. Grayham, 26 Miss. 210, 1853 Miss. LEXIS 77 (Miss. 1853).

3. Time for appeal.

Appeal to circuit court taken within 10 days from county court judgment in unlawful entry and detainer action held timely, five-day statute being inapplicable. McCandless v. Day, 162 Miss. 859, 140 So. 337, 1932 Miss. LEXIS 172 (Miss. 1932).

Appeal from a judgment dispossessing a tenant, rendered by justice of peace, must

be taken within five days after pronouncement of judgment. Simpson v. Boykin, 118 Miss. 701, 79 So. 852, 1918 Miss. LEXIS 123 (Miss. 1918), overruled, Jackson v. Schwartz, 240 So. 2d 60, 1970 Miss. LEXIS 1267 (Miss. 1970).

The limitation of time on appeals from justice's court to the circuit court prescribed herein does not apply to criminal cases. Ex parte Grubbs, 80 Miss. 288, 31 So. 741, 1902 Miss. LEXIS 243 (Miss. 1902).

4. Matters determinable on appeal.

In a suit to remove tenant for nonpayment of rent, where the Supreme Court affirmed judgment for the landlord, money judgment would be assessed against tenant's supersedeas bond for rent in default for the period in which an appeal was pending. Williams v. Shivers, 222 Miss. 626, 76 So. 2d 838, 1955 Miss. LEXIS 646 (Miss. 1955).

The Legislature has adopted this section as part of the proceeding under Code 1906, § 2885, by a landlord to get possession of the rented premises and in such proceeding a recovery of rent is also permissible though not claimed in the affidavit. Stollenwerck v. Eure, 120 Miss. 233, 82 So. 68, 1919 Miss. LEXIS 80 (Miss. 1919).

Where, in proceedings to dispossess a tenant for holding over under Code 1892, § 2552, he appealed, it was error not to allow him to file in the circuit court for the first time the affidavit denying the facts averred by the landlord provided for in such section so as to entitle him to a trial on the merits of the issue so made. Harvey v. Clark, 81 Miss. 166, 32 So. 906, 1902 Miss. LEXIS 113 (Miss. 1902).

A defendant who has appealed to the circuit court cannot there complain of defects in the warrant or of the record to show the formal organization of the court of the justices. Brown v. Ashford, 56 Miss. 677, 1879 Miss. LEXIS 190 (Miss. 1879).

5. Jurisdiction.

Matter was brought in a county that did not have a county court; therefore, the matter was filed in justice court. Upon the ruling in justice court, the aggrieved party, which was a creditor, could appeal

the ruling to the circuit court for a new hearing on the merits, albeit in a summary manner. *Gandy v. Citicorp*, 985 So.

2d 371, 2008 Miss. App. LEXIS 360 (Miss. Ct. App. 2008).

OPINIONS OF THE ATTORNEY GENERAL

Based on Section 11-51-83, a tenant may obtain a supersedeas bond to stay a removal order while his appeal is pending. A supersedeas bond is a separate bond from the appeal bond. *Grubbs*, August 9, 1996, A.G. Op. #96-0523.

The court may grant a supersedeas upon proof of the party requesting the same, applying the same standards as for

a preliminary injunction. In all cases in which a discretionary supersedeas is granted, the court may require a bond sufficient to protect the interests of the other parties. This opinion supersedes MS AG Op., *Grubbs* (August 9, 1996) and MS AG Op., *Smith* (June 27, 1997). *Parker*, Aug. 27, 2004, A.G. Op. 04-0407.

RESEARCH REFERENCES

Am. Jur.

4 Am. Jur. 2d (Rev), Appellate Review §§ 75, 76, 94.

CJS.

4 C.J.S., Appeal and Error §§ 86-89.

§ 11-51-85. Appeals from judgment of justice court judge in civil cases.

Either party may appeal to the circuit court of the county from the judgment of any justice court judge if appeal be demanded and bond given within (10) days after the rendition of the judgment. The party taking the appeal shall give bond with a sufficient surety, to be approved by the clerk of the justice court payable to the opposite party, in the penalty of double the amount of the judgment, or double the value of the property involved, and all costs accrued and likely to accrue in the case, and in no case to be less than One Hundred Dollars (\$100.00), conditioned for the payment of such judgment as the circuit court may render against him; and the appeal, when demanded and bond given, shall operate as a supersedeas of execution on such judgment. Any defendant against whom a civil judgment may have been entered by a justice court judge who, by reason of his poverty, is not able to give bond may nevertheless appeal from such judgment on his making an affidavit that, by reason of his poverty, he is unable to give bond or other security to obtain such appeal, but the appeal in such case shall not operate as a supersedeas of the judgment. The clerk of the justice court shall at once make up a transcript of the record and properly transmit the same to the clerk of the circuit court, within fifteen (15) days after the bond has been filed. In counties where there is a county court, appeals from justice courts shall be to the county court.

HISTORY: Codes, *Hutchinson's* 1848, ch. 50, art. 17; 1857, ch. 58, art. 23; 1871, § 1332; 1880, § 2353; 1892, § 82; 1906, § 83; *Hemingway's* 1917, § 63; 1930, § 64; 1942, § 1198; Laws, 1912, ch. 203; Laws, 1973, ch. 374, § 1; Laws, 1981, ch. 471, § 40; Laws, 1982, ch. 423, § 24, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — Laws, 1982, ch. 423, § 29, provides as follows:

"SECTION 29. Sections 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 27 and 28 of this act shall take effect and be in force from and after March 31, 1982. Sections 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of this act shall take effect and be in force from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act."

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

Cross References — As to appeal from judgment of justice of the peace in proceedings for partition of property, see § 11-21-81.

Appeals from county court, see § 11-51-79.

Appeals to county court, see § 11-51-81.

Written demand for appeal in certain cases, see § 11-51-103.

Taxation of costs in cases appealed from inferior tribunals, see § 11-53-71.

Appeal from judgment of justice of the peace under state stock law, see § 69-13-23.

Appeals in proceedings against tenants holding over, see § 89-7-47.

Appeals from party wall proceedings before justice of the peace, see § 89-15-9.

Restrictions on who may sign bonds, see Miss. Uniform Circuit and County Court Rule 1.07.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction of circuit court.
3. Amount in controversy.
4. Appeal bond.
5. —Validity of bond.
6. —Liability on bond.
7. Time for appeal.
8. Notice of appeal.
9. Persons entitled to appeal.
10. Effect of appeal.
11. Proceedings on appeal.
12. —Omissions in record, effect of.
13. —Evidence.
14. Nonsuit or dismissal of appeal.

1. In general.

This statute is mandatory and jurisdictional. *Carney v. Moore*, 130 Miss. 658, 94 So. 890, 1922 Miss. LEXIS 249 (Miss. 1922).

Judgment is "rendered" when pronounced in open court at conclusion of trial, and not at time it is entered on docket. *Simpson v. Boykin*, 118 Miss. 701, 79 So. 852, 1918 Miss. LEXIS 123 (Miss. 1918), overruled, *Jackson v. Schwartz*, 240 So. 2d 60, 1970 Miss. LEXIS 1267 (Miss. 1970).

Neither this section (§ 83, Code 1906) nor § 95, Code 1906 (Code 1942, § 1211) have any application to an appeal provided for by § 80 (Code 1942, § 1195), giving a right of appeal to any person aggrieved by the action of a municipality. *Polk v. Hattiesburg*, 110 Miss. 80, 69 So. 1005, 1915 Miss. LEXIS 19 (Miss. 1915).

The statute (Code 1942, § 1147, *supra*) denying the right to appeal from a judgment by confession or consent does not apply to the courts of justices of the peace. *James v. Woods*, 65 Miss. 528, 5 So. 106, 1888 Miss. LEXIS 38 (Miss. 1888).

2. Jurisdiction of circuit court.

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492, 2 So. 2d 148, 1941 Miss. LEXIS 85 (Miss. 1941).

The circuit court did not err in overruling a motion to dismiss an appeal on the ground that the defendant appellant had failed to introduce in evidence the judgment, appeal bond and other proceedings had in a justice of the peace court so as to show that the circuit court had jurisdiction of the appeal from the justice court, the transcript of the proceedings and judgment of the justice of the peace being properly a part of the record in the supreme court although not offered in evidence in the circuit court, there being no showing as to the absence of the transcript from the justice of the peace court when the case was tried in the circuit court nor on the record before the supreme court. *Myrick v. Mansell*, 184 Miss. 701, 184 So. 447, 185 So. 581, 1938 Miss. LEXIS 311 (Miss. 1938).

On appeal from justice court, circuit court's jurisdiction is original, and case is tried *de novo*, though no written pleadings are required. *Lucedale Commercial Co. v. Strength*, 163 Miss. 346, 141 So. 769, 1932 Miss. LEXIS 50 (Miss. 1932).

Circuit court has no jurisdiction of an appeal from justice court of prosecuting witness taxed with cost. *Town of Lumberton v. Peyton*, 143 Miss. 777, 109 So. 740, 1926 Miss. LEXIS 320 (Miss. 1926).

Where a county is divided into two judicial districts and the district of a justice of the peace is partly in each of them, an appeal by a plaintiff from the justice court must be to the circuit court of the district of defendant's residence, the circuit court of the other district being without jurisdiction of such appeal. *Nations v. Lovejoy*, 77 Miss. 36, 25 So. 494, 1899 Miss. LEXIS 49 (Miss. 1899).

The time prescribed for the appeal is a limitation of the jurisdiction of the circuit court and an appeal taken after the prescribed time is a nullity. *Kramer v. Holster*, 55 Miss. 243, 1877 Miss. LEXIS 130 (Miss. 1877); *Campbell v. McCormick Motorcar Co.*, 147 Miss. 777, 113 So. 175, 1927 Miss. LEXIS 323 (Miss. 1927).

3. Amount in controversy.

Contradictory statements as to value or damage involved will not defeat circuit court's jurisdiction unless there was fraudulent undervaluation of property or

damage for the purpose of conferring jurisdiction in the justice of the peace court. *Harper v. Adams*, 141 Miss. 806, 106 So. 354, 1925 Miss. LEXIS 222 (Miss. 1925).

In appeal to Supreme Court amount in controversy is determined by value of the property replevied. *Gresham v. Kennedy*, 128 Miss. 469, 91 So. 129, 1922 Miss. LEXIS 131 (Miss. 1922).

4. Appeal bond.

Where an appellant had timely filed a proper appeal bond, he ought not be deprived of his right of appeal through the dereliction of the justice of the peace in failing to properly certify the transcript and the appellant should be allowed reasonable time in which to have perfected the transcript of proceedings in the justice of peace court. *Adams v. Day*, 212 Miss. 778, 55 So. 2d 490, 1951 Miss. LEXIS 510 (Miss. 1951).

Appellant, if desiring to avail himself of arbitrary refusal of justice of peace to approve appeal bond, should leave bond with justice before expiration of time for appeal. *Tripp Furniture Co. v. Cox*, 160 Miss. 90, 133 So. 238, 1931 Miss. LEXIS 156 (Miss. 1931).

Failure to deliver bond for appeal from justice of the peace within 10 days required dismissal, though delivery was impossible because of flood condition. *Lamas v. Renaldo*, 151 Miss. 325, 117 So. 331, 1928 Miss. LEXIS 274 (Miss.), modified, 152 Miss. 353, 118 So. 417, 1928 Miss. LEXIS 214 (Miss. 1928).

Rejection by justice of appeal bond, after previous timely acceptance and approval, did not defeat appeal. *Helton v. Federal Credit Co.*, 147 Miss. 95, 113 So. 196, 1927 Miss. LEXIS 335 (Miss. 1927).

Bond on appeal from justice being less than required by Code 1906 § 83 amended by Laws 1912 ch 203 denial of motion to dismiss appeal for insufficient bond without amendment or leave was error. *De Laval Separator Co. v. Cutts*, 142 Miss. 379, 107 So. 522, 1926 Miss. LEXIS 87 (Miss. 1926).

Bond insufficient when purporting to refer to entirely different appeal where nothing in record shows it was executed to perfect appeal therein described. *Nevers v. Gullotta*, 96 So. 513 (Miss. 1923).

Failure to file appeal bond within ten days after rendition of judgment not excused by fact justice was absent from home during last three days of period. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36, 1922 Miss. LEXIS 126 (Miss. 1922).

Where justice refused to approve bond, but offered to receive it and investigate, but it was not left with him or presented in due time, the appeal was properly dismissed. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36, 1922 Miss. LEXIS 126 (Miss. 1922).

Plaintiff appealing from justice's court need not give bond in double value of property where defendant in possession. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36, 1922 Miss. LEXIS 126 (Miss. 1922).

Appeal from circuit court in case originating in justice's court dismissed where there was no bond in the record on appeal from the justice to the circuit court. *Gaines v. State*, 48 So. 182 (Miss. 1909).

When an appeal bond has been tendered to a justice of the peace, the names of the sureties read to him, their sufficiency unquestioned and his approval of the bond stated by him, such facts constitute a legal filing which he cannot afterward invalidate. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010, 1904 Miss. LEXIS 124 (Miss. 1904).

Filing a bond in accordance with the statute within the time, with a justice of the peace, operates to remove a civil case to the circuit court. A justice cannot defeat the appeal by demanding a bond in a greater sum than that required by statute or by refusing to approve a proper bond. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010, 1904 Miss. LEXIS 124 (Miss. 1904).

Failure by a justice of the peace to endorse his approval of an appeal bond within five days will not affect the validity of the appeal if his subsequent approval endorsed thereon shows that the bond was filed within five days. *Winner & Meyer v. Williams*, 82 Miss. 669, 35 So. 308, 1903 Miss. LEXIS 201 (Miss. 1903).

An appeal bond is not bad because made before and in anticipation of the adverse judgment. *James v. Woods*, 65 Miss. 528, 5 So. 106, 1888 Miss. LEXIS 38 (Miss. 1888).

One who sues in forma pauperis cannot appeal without bond. *Woods v. Davidson*,

57 Miss. 206, 1879 Miss. LEXIS 44 (Miss. 1879).

5. —Validity of bond.

Although the approval of an appeal bond by the constable did not meet the requirements of the statutes, when the justice of peace accepted the bond and treated it as a valid appeal bond and filed it, along with other papers in the cause, in office of the clerk of the circuit court, the court had a right to permit the bond to be amended to conform with the statutory requirements, and to permit the justice of the peace to approve the bond, notwithstanding the expiration of the ten day period of time allowed by statute for the filing of such appeal bond. *Pennyman v. Alexander*, 229 Miss. 704, 91 So. 2d 728, 1957 Miss. LEXIS 317 (Miss. 1957).

Where bond on appeal to county court from justice court was approved, although it was for a sum less than statutory amount, and case was transferred to county court, appeal was not void but only defective, and county court had jurisdiction to enter nonsuit on appellant's motion which prevented justice court judgment from having effect of a final adjudication. *Keys v. Borden*, 178 Miss. 173, 171 So. 887, 1937 Miss. LEXIS 174 (Miss. 1937).

Bond must be presented to and approved by justice who tried the case, and where case was begun before one justice, who because of disqualification transferred it to another justice as provided by law, an appeal bond filed with and approved by the first was of no effect. *McPhail v. Blaun*, 95 Miss. 53, 48 So. 725 (Miss. 1909).

An appeal bond in a penalty less than the minimum sum required by law is not void but may be amended under Code 1892 § 92. *Denton v. Denton*, 77 Miss. 375, 27 So. 383, 1899 Miss. LEXIS 71 (Miss. 1899).

6. —Liability on bond.

Partner held not liable as surety on appeal bond from justice of peace court, which bond partner had not signed and had not authorized to be signed, and of which he had no knowledge, and did not acquiesce in signing of his name to bond by clerk of partnership. *Woodruff v. Lillis*,

174 Miss. 91, 164 So. 225, 1935 Miss. LEXIS 69 (Miss. 1935).

Partner held not liable on appeal bond from justice of peace court which was signed with authority of copartner in name of partnership, where partnership was mercantile firm not engaged in business of making surety bonds and copartner was without authority to bind partner unless authorized so to do by scope of partnership, or by partner. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225, 1935 Miss. LEXIS 69 (Miss. 1935).

A surety on an appeal bond ceases to be liable when pending the appeal the principal is discharged, his liability as surety not being continued by Bankrupt Act 1898 § 16. *Goyer Co. v. Jones*, 79 Miss. 253, 30 So. 651, 1901 Miss. LEXIS 52 (Miss. 1901).

If a defendant appeal to the circuit court and there dismiss his appeal, the plaintiff is entitled to judgment on the appeal bond for his debt, damages, and costs. *Pass v. Payne*, 63 Miss. 239, 1885 Miss. LEXIS 56 (Miss. 1885).

7. Time for appeal.

Motion to set aside justice court judgment and appeal, made and taken over 10 days after rendition of judgment, were void and did not justify sheriff's refusal to levy execution issued on judgment. *Womack v. Richardson*, 168 Miss. 347, 151 So. 173, 1933 Miss. LEXIS 209 (Miss. 1933).

The time prescribed for the appeal is a limitation of the jurisdiction of the circuit court and an appeal taken after the prescribed time is a nullity. *Campbell v. McCormick Motorcar Co.*, 147 Miss. 777, 113 So. 175, 1927 Miss. LEXIS 323 (Miss. 1927); *Kramer v. Holster*, 55 Miss. 243, 1877 Miss. LEXIS 130 (Miss. 1877).

The limitations of time on appeals from justices' courts to the circuit court, prescribed by Code 1892 §§ 82 and 84 do not apply to criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741, 1902 Miss. LEXIS 243 (Miss. 1902).

8. Notice of appeal.

Notice of appeal from justice of the peace to the circuit court, unnecessary. *Corry v. Buddendorff*, 98 Miss. 98, 54 So. 84, 1910 Miss. LEXIS 104 (Miss. 1910).

Where appellant on appeal from a justice gave the bond required by the statute and the record and papers were sent up, no notice of appeal was necessary. *Rowe v. W. D. Cannon, Jr., & Co.*, 84 Miss. 101, 36 So. 146, 1904 Miss. LEXIS 11 (Miss. 1904).

When a bond is executed and the record transmitted, the case stands for trial *de novo* in the circuit court without new process to the appellee. *Rowe v. W. D. Cannon, Jr., & Co.*, 84 Miss. 101, 36 So. 146, 1904 Miss. LEXIS 11 (Miss. 1904).

9. Persons entitled to appeal.

A plaintiff whose suit before a justice of the peace has been dismissed because of his absence and failure to prosecute may appeal to the circuit court from the judgment of dismissal. *Horn v. McKinnon*, 78 Miss. 307, 29 So. 149 (Miss. 1900).

When a judgment was rendered by a justice of the peace against three persons, only two of whom executed an appeal bond, the appeal was good as to the two and the judgment remained in force as to the defendant who did not give bond. *Roberts v. Weiler & Haas*, 52 Miss. 299, 1876 Miss. LEXIS 213 (Miss. 1876).

10. Effect of appeal.

Justice court's judgment is vacated or superseded by appeal to circuit court, although revived by dismissal of appeal. *Lucedale Commercial Co. v. Strength*, 163 Miss. 346, 141 So. 769, 1932 Miss. LEXIS 50 (Miss. 1932).

11. Proceedings on appeal.

On appeal from justice court, transcript is presumptively correct, there being no suggestion from either party that anything is omitted. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

Circuit court may dismiss an appeal from conviction before a justice for failure to appear without inquiring into the trial affidavit's validity. *Gillie v. State*, 126 Miss. 832, 89 So. 665, 1921 Miss. LEXIS 81 (Miss. 1921).

Where the next term of the circuit court after trial of claimant's issue on November 13th convened on November 17th, and bond and papers in the case were not filed

in the circuit court at that term, and there was no proceeding to require justice to send them up, a motion in the following March term to dismiss the appeal for want of prosecution was properly denied. *Dalee Bros. v. Wigginton*, 111 Miss. 749, 72 So. 149, 1916 Miss. LEXIS 383 (Miss. 1916).

12. —Omissions in record, effect of.

Where justice did not file in circuit court certified transcript of record, judgment on appeal from circuit court will be reversed and remanded. *Gordon v. Sykes*, 155 Miss. 705, 125 So. 85, 1929 Miss. LEXIS 340 (Miss. 1929).

Failure of justice to certify record in bastardy proceedings did not defeat jurisdiction of circuit court, justice proceedings being preliminary. *Shelby v. Harvey*, 152 Miss. 180, 118 So. 896, 1928 Miss. LEXIS 232 (Miss. 1928).

Order overruling motion to dismiss appeal from justice court will be affirmed, where record does not contain testimony introduced thereon. *Campbell v. McCormick Motorcar Co.*, 147 Miss. 777, 113 So. 175, 1927 Miss. LEXIS 323 (Miss. 1927).

Where record in case originating in justice's court contains no transcript of proceedings therein, judgment of court below must be reversed and case remanded. *Burrow v. State*, 143 Miss. 221, 108 So. 505, 1926 Miss. LEXIS 258 (Miss. 1926).

Where neither justice's transcript nor original papers certified by the justice showed service of process supporting default judgment, an execution on the judgment was properly quashed and the garnishment discharged by circuit court on appeal. *Carrollton Hardware & Implement Co. v. Marshall*, 117 Miss. 224, 78 So. 7, 1918 Miss. LEXIS 166 (Miss. 1918), overruled, *Bank of Philadelphia v. Posey*, 130 Miss. 530, 92 So. 840, 1922 Miss. LEXIS 176 (Miss. 1922).

Where transcript fails to show any judgment rendered in justice court where the action originated, or that any appeal bond was given, appeal will be dismissed for want of jurisdiction. *Kimball v. Louisville & N. R. Co.*, 94 Miss. 396, 48 So. 230, 1908 Miss. LEXIS 39 (Miss. 1908).

Where record does not show any appeal from the justice nor any judgment there, the Supreme Court is without jurisdiction.

Bush v. Ross, 90 Miss. 32, 43 So. 70 (Miss. 1907).

Where the sum demanded is less than \$200 in a case at law and the record does not show that it was appealed from a justice court to the circuit court, the Supreme Court of its own motion will dismiss the appeal to it for want of jurisdiction, although the stenographer's notes recite that the case was appealed to the circuit court from a justice court. *Gardner v. New Orleans & N. E. R. Co.*, 78 Miss. 640, 29 So. 469, 1900 Miss. LEXIS 160 (Miss. 1900), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

After the submission of such a case, the Supreme Court will remand it to the docket and award a certiorari to perfect the record only on condition that the appellant pay all costs of the appeal. *Gardner v. New Orleans & N. E. R. Co.*, 78 Miss. 640, 29 So. 469, 1900 Miss. LEXIS 160 (Miss. 1900), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

If on appeal the record shows the amount in controversy to be below the original jurisdiction of the circuit court and does not show that the case originated in a justice court, the Supreme Court will reverse the judgment and dismiss the proceedings in the circuit court, leaving the judgment in the justice court, if any, to stand. *Andrews v. Wallace*, 72 Miss. 291, 16 So. 204, 1894 Miss. LEXIS 64 (Miss. 1894).

13. —Evidence.

On appeal from justice court, alleged defect in transcript, or omission of essential parts, cannot be supplied by oral testimony. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

Notes sued on in justice court, not shown by transcript to have been lodged with justice, held inadmissible over objection in circuit court, notwithstanding plaintiff testified that he filed notes with declaration. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

14. Nonsuit or dismissal of appeal.

Where bond on appeal to county court from justice court was approved, although

it was for a sum less than statutory amount, and case was transferred to county court, appeal was not void but only defective, and county court had jurisdiction to enter nonsuit on appellant's motion which prevented justice court judgment from having effect of a final adjudication. *Keys v. Borden*, 178 Miss. 173, 171 So. 887, 1937 Miss. LEXIS 174 (Miss. 1937).

Although a dismissal of an appeal from justice court to circuit court revives the judgment in the justice court, plaintiff

could suffer voluntary nonsuit without thereby reinstating justice court's judgment so as to render it res judicata. *Lucedale Commercial Co. v. Strength*, 163 Miss. 346, 141 So. 769, 1932 Miss. LEXIS 50 (Miss. 1932).

If a defendant appeal to the circuit court and there dismiss his appeal, the plaintiff is entitled to judgment on the appeal bond for his debt, damages and costs. *Pass v. Payne*, 63 Miss. 239, 1885 Miss. LEXIS 56 (Miss. 1885).

OPINIONS OF THE ATTORNEY GENERAL

Party who perfects civil appeal is not required to prepay any costs into Circuit Court Clerk's office as condition of perfecting said appeal; all costs involved in civil appeal from Justice Court are required to be included in amount of appeal bond which is conditioned for payment of such judgment and costs as Judge may levy, said costs are not due until final determi-

nation of appeal. *Barnette*, July 29, 1992, A.G. Op. #92-0567.

The 10-day rule in Section 11-51-85 does not apply to replevins; someone wishing to appeal a replevin has 30 days to file a notice of appeal with the circuit court under Rule 5.04 of the Uniform Rules of Circuit and County Court Practice. *Aldridge*, May 13, 2005, A.G. Op. 05-0180.

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 209- 221, 539- 553.

47 Am. Jur. 2d (Rev), Justices of the Peace §§ 31 et seq.

CJS.

4 C.J.S., Appeal and Error §§ 237, 238, 246.

4 C.J.S., Appeal and Error § 357.

51 C.J.S., Justices of the Peace §§ 129 et seq.

§ 11-51-87. Copy of record to be transmitted.

The justice court judge may prepare and certify his record to the following effect, viz.:

"Copy of the record of the proceedings before _____, a justice court judge of _____ county, in the case therein set forth, to wit: (here copy the entries on the docket and certify as follows, viz.):

"State of Mississippi, _____ County:

"I, _____, a justice court judge of the said county, certify that the foregoing is a copy of the record of the proceedings before me in the case stated therein, as appears on my docket.

"Given under my hand, this the _____ day of _____, A.D. _____.

Justice Court Judge"

HISTORY: Codes, 1880, § 2241; 1892, § 83; 1906, § 84; Hemingway's 1917, § 64; 1930, § 65; 1942, § 1199; Laws, 1981, ch. 471, § 41; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Notes — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982).

In the effective date language for Chapter 423, Laws of 1982, in this section's history information, there is a reference to provisions found in Section 9-11-27(3). Section 9-11-27 has been amended several times since this section was amended by Chapter 423, Laws of 1982, and subsection (3) has been deleted. Corresponding provisions are now found in subsection (1) of Section 9-11-27.

JUDICIAL DECISIONS

ANALYSIS

1. Certification of record.
2. —Waiver of defective certification.
3. Transcript, necessity and sufficiency of.
4. Evidence.

1. Certification of record.

The many cases cited under this section [Code 1972, § 11-51-87] holding that the Supreme Court acquired no jurisdiction in cases where a copy of the judgment of the justice of the peace was not included in the record on appeal are overruled because of two statutes—Code 1972, §§ 11-3-35 and 99-35-143 which were apparently overlooked by the early cases. *Avera v. State*, 300 So. 2d 787, 1974 Miss. LEXIS 1636 (Miss. 1974).

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before

or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. *Whittington v. State*, 218 Miss. 631, 67 So. 2d 515, 1953 Miss. LEXIS 581 (Miss. 1953).

Where the supreme court affirmed a judgment of the circuit court dismissing the appeal of defendant from conviction in a mayor's court for selling beer to a minor, and granting a writ of procedendo to the mayor's court, to be issued "unless appellant shall perfect the record of the certificate of the mayor's court," and the circuit court dismissed appellant's motion thereafter to reinstate the cause in the circuit court and to issue a writ of certiorari to compel the mayor to certify the transcript to the circuit court on the ground that the writ was not applied for within the six months allowed by law, such appellant was entitled to have the cause reinstated in the circuit court and to an issuance of the writ of certiorari, since the fact remained that the appellant had never been able to obtain a trial of the cause in the

circuit court on its merits. *Fassman v. Centreville*, 184 Miss. 520, 186 So. 641, 1939 Miss. LEXIS 67 (Miss. 1939).

Justice certifying at bottom of a petition for appeal, that the same had been filed and appeal granted as of a certain date, will not be permitted to impeach his own certificate. *Town of Purvis v. Rees*, 99 Miss. 636, 55 So. 481, 1911 Miss. LEXIS 233 (Miss. 1911).

A copy of the record must be certified to by the justice of the peace or police justice, and certification by the city clerk is insufficient. *Rodgers v. Hattiesburg*, 99 Miss. 639, 55 So. 481, 1911 Miss. LEXIS 234 (Miss. 1911).

Where proceedings in justice court are not certified as required and are not shown in any manner, circuit court is without jurisdiction. *Levis-Zukoski Mercantile Co. v. McIntyre*, 93 Miss. 806, 47 So. 435, 1908 Miss. LEXIS 140 (Miss. 1908).

Where a copy of the justice's docket entries, judgment, affidavit and appeal bond were filed in the circuit court, defendant, after a trial and conviction in the circuit court cannot raise the objection that there was no certificate of the justice to his record. *Calhoun v. State*, 86 Miss. 553, 38 So. 660, 1905 Miss. LEXIS 70 (Miss. 1905).

It is a copy of the docket entries and judgments which the justice of the peace is to certify. *Hughston v. Cornish*, 59 Miss. 372, 1882 Miss. LEXIS 119 (Miss. 1882).

2. —Waiver of defective certification.

Defective certification of record by justice may not be cured or waived. *Xydias v. Pellman*, 121 Miss. 400, 83 So. 620, 1919 Miss. LEXIS 174 (Miss. 1919).

3. Transcript, necessity and sufficiency of.

The many cases cited under this section [Code 1972, § 11-51-87] holding that the Supreme Court acquired no jurisdiction in cases where a copy of the judgment of the justice of the peace was not included in the record on appeal are overruled because of two statutes—Code 1972, §§ 11-3-35 and 99-35-143 which were apparently overlooked by the early cases. *Avera v. State*, 300 So. 2d 787, 1974 Miss. LEXIS 1636 (Miss. 1974).

Justice court record of conviction which included copy of affidavit charging unlawful possession of liquor, warrant for arrest, appearance bond, and judgment followed by justice's certificate that such was true copy of record was sufficient to give circuit court jurisdiction of appeal under statute. *Stewart v. State*, 179 Miss. 31, 174 So. 579, 1937 Miss. LEXIS 22 (Miss. 1937).

Transcript of proceedings of unlawful entry and detainer court held to show substantial compliance with statute, conferring jurisdiction on circuit court on appeal thereto, although justice did not precede his record with statement that it was copy of record of proceedings had before him. *Williams v. Johnson*, 175 Miss. 419, 167 So. 639, 1936 Miss. LEXIS 67 (Miss. 1936).

Failure of judgment of justice of peace on appeal to circuit court, to set forth judicial district, did not invalidate it. *Dotson v. State*, 156 Miss. 365, 126 So. 38, 1930 Miss. LEXIS 180 (Miss. 1930).

Where justice did not file in circuit court certified transcript of record, judgment on appeal from circuit court will be reversed and remanded. *Gordon v. Sykes*, 155 Miss. 705, 125 So. 85, 1929 Miss. LEXIS 340 (Miss. 1929).

On failure of record to show judgment of justice, certificate or transcript, circuit court has not jurisdiction of prosecution for assault and battery. *Cook v. State*, 144 Miss. 519, 110 So. 443, 1926 Miss. LEXIS 413 (Miss. 1926).

Where record shows that circuit court did not have jurisdiction because transcript was not filed at time case was tried, but shows that since the circuit court trial, such transcript had been filed, the Supreme Court must reverse and remand the case for a new trial. *Salers v. State*, 142 Miss. 88, 107 So. 375, 1926 Miss. LEXIS 72 (Miss. 1926).

Transcript of proceedings before justice of the peace is essential to jurisdiction of appeal to circuit court; in case appealed from justice of the peace court to circuit court, judgment of latter court must be reversed, where record does not show transcript of first named court was in circuit court at time of trial. *Dorsey v. State*, 141 Miss. 600, 106 So. 827, 1926 Miss. LEXIS 464 (Miss. 1926).

Appeal from the circuit court, which was without jurisdiction because of insufficiency of the record, will be heard in the Supreme Court only where the record is perfected by certiorari. *Levis-Zukoski Mercantile Co. v. McIntyre*, 93 Miss. 806, 47 So. 435, 1908 Miss. LEXIS 140 (Miss. 1908).

A circuit court has no jurisdiction of an appeal taken from a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. *Ball, Brown & Co. v. Sledge*, 82 Miss. 747, 35 So. 214, 1903 Miss. LEXIS 199 (Miss. 1903), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

If appellants do not have the transcript show a judgment of justice of the peace and bond for appeal to the circuit court, the Supreme Court will dismiss an appeal to it from the circuit court with leave to reinstate only upon completing the record and paying all costs of appeal. *Gardner v. New Orleans & N. E. R. Co.*, 78 Miss. 640, 29 So. 469, 1900 Miss. LEXIS 160 (Miss. 1900), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

4. Evidence.

While it is true that on appeals to the

circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492, 2 So. 2d 148, 1941 Miss. LEXIS 85 (Miss. 1941).

On appeal it must be assumed that certification of record of justice claimed to have been made but lost was not established, and that circuit court did not have jurisdiction, there being no judgment of the circuit court showing such establishment. *Brasham v. State*, 140 Miss. 712, 106 So. 280, 1925 Miss. LEXIS 306 (Miss. 1925).

Record certified to circuit court on appeal from justice of the peace, including copy of the judgment of justice, is competent evidence in the circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808, 1925 Miss. LEXIS 125 (Miss. 1925).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 385 et seq., 227 et seq., 410.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal and Error, Form 546.1 (notice to clerk – to prepare record – clerk's and reporter's

transcripts – selective reporter's transcript and designated papers for clerk's transcript).

CJS.

4 C.J.S., Appeal and Error § 554.

§ 11-51-89. Justice, mayor, or police justice to deliver papers to circuit clerk.

The justice of the peace, mayor or police justice of any city, town or village from whose decision an appeal shall be taken, shall at once transmit to the clerk of that court a certified copy of the record of the proceedings, with all the original papers and process in the case, and the original appeal bond given by the appellant, and the clerk shall docket the same, and shall be entitled to the same fees, upon such appeals, as for similar services in suits originating in said court. The justice, mayor, or police justice of any city, town or village shall, at all times, be allowed to amend his return according to the facts.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 3; 1857, ch. 58, art. 24; 1871, § 1333; 1880, § 2353; 1892, § 84; 1906, § 85; Hemingway's 1917, § 65; 1930, § 66; 1942, § 1200.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appeals to county court, see § 11-51-81.

JUDICIAL DECISIONS

ANALYSIS

1. Transmission of record.
2. —Certificate of justice.
3. Failure to transmit record.
4. Jurisdiction on appeal.
5. Omissions in record, effect of.
6. Notice of appeal.
7. Time for appeal.
8. Evidence.
9. Amendment of return.

1. Transmission of record.

Although under the statutes it is still mandatory that the justice of the peace, or the mayor or police justice, in appeals from their courts, shall transmit to the proper clerk a certified copy of the record of the proceedings with the original papers, process and appeal bond, yet, if no objection is made to the transcript before or during the trial of the case on its merits, it will be conclusively presumed that the transcript was before the court and complied in every respect with the law. *Whittington v. State*, 218 Miss. 631, 67 So. 2d 515, 1953 Miss. LEXIS 581 (Miss. 1953).

Where a justice of the peace had not certified record made in his court as required by statute, and there was no objection made at the trial, the objection could not be made for the first time in the Supreme Court. *Laird v. Forbes*, 214 Miss. 250, 58 So. 2d 660, 1952 Miss. LEXIS 464 (Miss. 1952).

On appeal from justice court, transcript is presumptively correct; there being no suggestion from either party that anything is omitted. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

This section [Code 1942, § 1200] is so modified by Code 1892, § 2432 (Code 1906, § 2763) that an appeal may be

heard after the term following, provided the record is sent up by the successor of a justice of the peace who died after appeal taken but before the record had been sent up. *Brennan v. Straas*, 85 Miss. 341, 37 So. 956, 1904 Miss. LEXIS 163 (Miss. 1904).

The record of which the justice is to transmit a copy is his docket entries and judgments. *Hughston v. Cornish*, 59 Miss. 372, 1882 Miss. LEXIS 119 (Miss. 1882).

2. —Certificate of justice.

The circuit court acquires no jurisdiction of a cause appealed from the justice of peace court where the transcript of the proceedings in the latter court, filed in the circuit court, is not authenticated by the certificate of the justice of peace. *Adams v. Day*, 212 Miss. 778, 55 So. 2d 490, 1951 Miss. LEXIS 510 (Miss. 1951).

Where an appellant timely filed a proper appeal bond, he ought not to be deprived of his right of appeal through the dereliction of the justice of peace in failing to properly certify the transcript and the appellant should be allowed reasonable time in which to have perfected the transcript of proceedings in the justice of peace court. *Adams v. Day*, 212 Miss. 778, 55 So. 2d 490, 1951 Miss. LEXIS 510 (Miss. 1951).

A copy of the record must be certified to by the justice of the peace or police justice, and certification by the city clerk is insufficient. *Greenwood v. Weaver*, 96 Miss. 604, 50 So. 981, 1910 Miss. LEXIS 154 (Miss. 1910); *Allen v. State*, 98 Miss. 192, 53 So. 498, 1910 Miss. LEXIS 51 (Miss. 1910); *Rodgers v. Hattiesburg*, 99 Miss. 639, 55 So. 481, 1911 Miss. LEXIS 234 (Miss. 1911).

Where, on appeal, a copy of the justice's docket entries, judgment, affidavit and appeal bond were filed in the circuit court, defendant, after trial and conviction in the

circuit court cannot raise objection that there was no certificate of the justice to his record. *Calhoun v. State*, 86 Miss. 553, 38 So. 660, 1905 Miss. LEXIS 70 (Miss. 1905).

3. Failure to transmit record.

Circuit court may issue necessary writ to compel justice of peace to send up record to circuit court. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010, 1904 Miss. LEXIS 124 (Miss. 1904).

Such a writ though commonly called a certiorari is not a certiorari. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010, 1904 Miss. LEXIS 124 (Miss. 1904).

It may be issued without appellant giving any other than the appeal bond and when performance of duty by a justice is effected the trial will be *de novo*. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010, 1904 Miss. LEXIS 124 (Miss. 1904).

4. Jurisdiction on appeal.

While it is true that on appeal to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492, 2 So. 2d 148, 1941 Miss. LEXIS 85 (Miss. 1941).

Certificates must be attached to record of proceedings before justice of peace to warrant circuit court jurisdiction on appeal. *Pierce v. Jernigan*, 151 Miss. 758, 118 So. 898, 1928 Miss. LEXIS 375 (Miss. 1928).

When the circuit court acquired no jurisdiction on appeal from a police justice of a city, the Supreme Court has no jurisdiction. *Rodgers v. Hattiesburg*, 99 Miss. 639, 55 So. 481, 1911 Miss. LEXIS 234 (Miss. 1911).

Where the proceedings in justice court are not certified and are not shown in any manner, the circuit court is without jurisdiction. *McPhail v. Blann*, 47 So. 666

(Miss. 1908), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929); *Murphy v. Hutchinson*, 93 Miss. 643, 48 So. 178, 1908 Miss. LEXIS 163 (Miss. 1908).

A circuit court has no jurisdiction of an appeal taken from a justice of the peace unless the record shows that a judgment was rendered by the justice of the peace and an appeal bond executed. *Ball, Brown & Co. v. Sledge*, 82 Miss. 747, 35 So. 214, 1903 Miss. LEXIS 199 (Miss. 1903), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

5. Omissions in record, effect of.

Where, on appeal from justice court, no certified transcript appeared in record, and objection raising such question was specifically made in circuit court, such court had no authority to render judgment on merits, but should dismiss appeal. *Land v. Coffey*, 171 Miss. 91, 157 So. 89, 1934 Miss. LEXIS 210 (Miss. 1934).

Not necessary that judgment of police court by mayor pro tempore show mayor's absence or incapacity. *City of Pascagoula v. Sharp*, 136 Miss. 756, 101 So. 683, 1924 Miss. LEXIS 163 (Miss. 1924).

Defendant convicted of misdemeanor in the circuit court, on appeal from justice of peace cannot complain on motion in arrest of judgment of absence of a duly certified copy of the proceedings of the justice of the peace, if there be on file in the circuit court the affidavit, a copy of the judgment, and his appeal bond. *Calhoun v. State*, 86 Miss. 553, 38 So. 660, 1905 Miss. LEXIS 70 (Miss. 1905).

If appellants do not have the transcript show a judgment of the justice of the peace and bond for appeal to the circuit court, the Supreme Court will dismiss an appeal to it from the circuit court with leave to reinstate only upon completing the record and paying all costs of appeal. *Gardner v. New Orleans & N. E. R. Co.*, 78 Miss. 640, 29 So. 469, 1900 Miss. LEXIS 160 (Miss. 1900), overruled, *Jones v. State*, 155 Miss. 364, 123 So. 882, 1929 Miss. LEXIS 261 (Miss. 1929).

6. Notice of appeal.

When a bond is executed and the record transmitted, the case stands for trial de

novo in the circuit court without new process to the appellee. *Rowe v. W. D. Cannon, Jr., & Co.*, 84 Miss. 101, 36 So. 146, 1904 Miss. LEXIS 11 (Miss. 1904).

7. Time for appeal.

The limitations of time on appeals from justices' courts to the circuit court, prescribed by Code 1892, §§ 82, 84, do not apply to criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741, 1902 Miss. LEXIS 243 (Miss. 1902).

8. Evidence.

On appeal from justice court, alleged defect in transcript, or omission of essential parts, cannot be supplied by oral testimony. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

Notes sued on in justice court, not shown by transcript to have been lodged with justice, held inadmissible over objection in circuit court, notwithstanding plaintiff testified that he filed notes with declaration. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854, 1935 Miss. LEXIS 137 (Miss. 1935).

Record certified to the circuit court on appeal from justice court, including copy of judgment of justice of peace is competent evidence in the circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808, 1925 Miss. LEXIS 125 (Miss. 1925).

Where the record shows that the judgment was rendered several days after the return day of the summons, it is presumed, nothing appearing to the contrary, that the court met on the return day and adjourned from day to day until the judgment was entered. *Leavenworth v. Crit-*

tenden, 62 Miss. 573, 1885 Miss. LEXIS 111 (Miss. 1885).

9. Amendment of return.

Under this section [Code 1942, § 1200], circuit court properly permitted police justice to amend printed form used for certifying to transcript of proceedings had before him, which amendment consisted of striking out printed words "Ex officio Justice of the Peace" as they appeared underneath signature of person who had tried case as police justice, and inserting in lieu thereof the words "Police Justice of said City," caption of transcript having been changed from "State of Mississippi" to "City of Brookhaven," amendment being made according to facts. *Serio v. Brookhaven*, 208 Miss. 620, 45 So. 2d 257, 1950 Miss. LEXIS 279 (Miss. 1950).

Justice of the peace should have been permitted to amend the affidavit for appeal in accordance with the facts, by affixing his signature and the date, and a refusal to allow such amendment required reversal of the judgment of dismissal of the appeal. *Green v. Boon*, 57 Miss. 617, 1880 Miss. LEXIS 17 (Miss. 1880).

The power to allow amendments should be liberally exercised. *Weddell v. Seal*, 45 Miss. 726, 1871 Miss. LEXIS 125 (Miss. 1871); *Green v. Boon*, 57 Miss. 617, 1880 Miss. LEXIS 17 (Miss. 1880).

Mere omission, in affidavit for an appeal from the judgment of a justice of the peace, of the date of the affidavit, if in fact the affidavit was made and filed in proper time, may be amended to show the true date. *Weddell v. Seal*, 45 Miss. 726, 1871 Miss. LEXIS 125 (Miss. 1871).

RESEARCH REFERENCES

ALR.

Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 402- 412, 417, 424.

CJS.

4 C.J.S., Appeal and Error §§ 564, 565-572.

§ 11-51-91. Trial of cases on appeal from justice of the peace.

On appeal from a justice of the peace court to the circuit court the case shall be tried anew, in a summary way, without pleadings in writing, at the first term, unless cause be shown for a continuance; provided, however, that the circuit court shall have the authority and power of its own motion or on motion of any party to require that defenses to the action shall be set up by way of answer in like manner as is required by Section 11-7-59, Mississippi Code of 1972.

If it appear on the trial that the suit was brought before a justice of the peace not having jurisdiction thereof, the circuit court shall reverse the judgment of the justice and dismiss the case. If the defendant be the appellant and judgment be rendered for the plaintiff in the original suit for a sum equal to or greater than he recovered before the justice of the peace, ten per cent (10%) damages upon the amount thereof shall be included in such judgment; and similarly, when there has been an appeal from a justice of the peace court to a county court, and any judgment against an appellant shall be rendered against the principal and his sureties jointly and when there shall be an appeal from the county court to the circuit court and the same shall be affirmed, then, there shall be added five per cent (5%) damages, and judgment shall be rendered against the principal and the sureties on the appeal bond jointly. In all such cases where the amount in controversy exceeds the sum of Fifty Dollars (\$50.00), either party shall be entitled to an appeal to the supreme court as in cases originating in the circuit court, and the plaintiff may also appeal to the supreme court in cases where the difference between his demand and the judgment in his favor shall exceed said sum.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 2 (19); 1857, ch. 58, art. 25; 1871, § 1334; 1880, § 2354; 1892, § 85; 1906, § 86; Hemingway's 1917, § 66; 1930, § 67; 1942, § 1201; Laws, 1964, ch. 301, § 1.

Editor's Notes — Section 11-7-59 referred to in this section was repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appeals from county court, see § 11-51-79.

Appeals to county court, see § 11-51-81.

Costs in case of appeal from justice of the peace, see § 11-53-51.

Taxation of costs in case appealed from inferior tribunal, see § 11-53-71.

Procedural requirements for appeals to circuit courts, see MRCrP 18.1 and 29.1 through 29.5.

JUDICIAL DECISIONS

ANALYSIS

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| <ol style="list-style-type: none"> 1. In general. 2. Appeal bond. 3. Jurisdiction of circuit court. 4. Appeals to Supreme Court. | <ol style="list-style-type: none"> 5. —Amount in controversy, determination of. 6. —Consent of parties, effect of. 7. Effect of appeal. 8. Proceedings on appeal. 9. —Amendment. |
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10. —Parties.
11. —Evidence.
12. —Judgment.
13. —Damages.
14. Nonsuit or dismissal of appeal.

1. In general.

Under this section [Code 1972, § 11-51-91], when the circuit court determined on appeal that the justice court did not have jurisdiction of the defendants, the circuit court only had authority to reverse and dismiss the case against each defendant, and jurisdiction could not be conferred upon the proper justice court by remand of the circuit court; such action would have been harmless if the second justice court had acquired jurisdiction independently of remand, by the filing of new affidavits in that court. *Avera v. State*, 305 So. 2d 359, 1974 Miss. LEXIS 1484 (Miss. 1974).

On appeal of a cause by the defendant from justice's court to the circuit court, the successful plaintiff may be required to furnish security for cost, since the case will be tried anew, as if never tried before, and the rights of both parties are the same as if the suit had been originally brought in the circuit court; the plaintiff, who must now prosecute his case anew, enjoys the privilege of seeking a larger judgment and is confronted with the possibility of liability or further cost in the event he loses his case or recovers judgment for less than the amount appealed from. *Archer v. High*, 193 Miss. 361, 9 So. 2d 647, 1942 Miss. LEXIS 118 (Miss. 1942).

Code 1892, § 79 (Code 1942, § 1195) allows appeal from board of supervisors to the circuit court for final judgment there. This section [Code 1942, § 1201] (§ 85, Code 1892) limits appeals from the circuit court to cases where amount in controversy exceeds \$50 if originating in the courts of justices of the peace. There is no such limitation as to boards of supervisors, and the board may appeal from a judgment without bond. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007, 1906 Miss. LEXIS 153 (Miss. 1906).

This section [Code 1942, § 1201] applies in bastardy proceedings. *Norton v. Wicker*, 87 Miss. 365, 39 So. 809, 1905 Miss. LEXIS 138 (Miss. 1905).

2. Appeal bond.

Where bond on appeal to county court

from justice court was approved, although it was for a sum less than statutory amount, and case was transferred to county court, appeal was not void but only defective, and county court had jurisdiction to enter nonsuit on appellant's motion which prevented justice court judgment from having effect of a final adjudication. *Keys v. Borden*, 178 Miss. 173, 171 So. 887, 1937 Miss. LEXIS 174 (Miss. 1937).

Partner held not liable as surety on appeal bond from justice of peace court, which bond partner had not signed and had not authorized to be signed, and of which he had no knowledge, and did not acquiesce in signing of his name to bond by clerk of partnership. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225, 1935 Miss. LEXIS 69 (Miss. 1935).

Partner held not liable on appeal bond from justice of peace court which was signed with authority of copartner in name of partnership, where partnership was mercantile firm not engaged in business of making surety bonds and copartner was without authority to bind partner unless authorized so to do by scope of partnership, or by partner. *Woodruff v. Lillis*, 174 Miss. 91, 164 So. 225, 1935 Miss. LEXIS 69 (Miss. 1935).

3. Jurisdiction of circuit court.

While it is true that on appeals to the circuit courts from the justice of the peace courts in both civil and criminal cases, it is necessary that a certified transcript of the record of the proceedings in the justice courts be filed in the circuit court in order to confer on the circuit court jurisdiction to try the appeal on its merits, it is not necessary to produce in evidence on the trial such transcript or any essential part thereof in order to confer jurisdiction on the circuit court to try the case upon its merits. *Lee v. State*, 190 Miss. 877, 1 So. 2d 492, 2 So. 2d 148, 1941 Miss. LEXIS 85 (Miss. 1941).

On appeal from justice court, circuit court's jurisdiction is original, and case is tried de novo, though no written pleadings are required. *Lucedale Commercial Co. v. Strength*, 163 Miss. 346, 141 So. 769, 1932 Miss. LEXIS 50 (Miss. 1932).

Jurisdictional amount may be supplied by counterclaim. *Crooke v. Deas & Duke*,

146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

Circuit court on appeal from justice court has jurisdiction if justice court had jurisdiction. *Hobbs Auto Co. v. Jones*, 140 Miss. 610, 105 So. 764, 1925 Miss. LEXIS 296 (Miss. 1925).

Where the district of a justice of the peace is partly in each of two circuit court districts, an appeal must be prosecuted to the circuit court of the district of defendant's residence. *Woods v. Speer*, 127 Miss. 593, 90 So. 322, 1921 Miss. LEXIS 262 (Miss. 1921).

On appeal from a judgment of a justice of the peace, rendered without service of summons or appearance of defendant, the circuit court had no other jurisdiction than the justice of the peace had, the appellant's appearance in the circuit court conferring no original jurisdiction on that court. *Dufour v. Chapotel*, 75 Miss. 656, 23 So. 387, 1898 Miss. LEXIS 10 (Miss. 1898).

Under this section [Code 1942, § 1201] it is only where the justice has no jurisdiction and not where he makes an erroneous decision within his jurisdiction that the case is to be dismissed by the circuit court on appeal. *Goodbar v. Owen*, 70 Miss. 840, 12 So. 556, 1893 Miss. LEXIS 6 (Miss. 1893).

If the plaintiff loses an attachment suit in the justice court and appeals, the circuit court has jurisdiction, though after dismissal by the plaintiff, to allow claimant's issues to be made up and tried, although no trial thereof was had in the justice's court, for the appeal of the plaintiff on the main issues carries with it all such ancillary issues as are necessary to determine the proper disposition of the property. *Dreyfus v. Mayer*, 69 Miss. 282, 12 So. 267, 1891 Miss. LEXIS 107 (Miss. 1891).

The appearance of the defendant before a justice of the peace is not a waiver of his right to raise the question of jurisdiction in the circuit court. *Heggie v. Stone*, 70 Miss. 39, 12 So. 253, 1892 Miss. LEXIS 113 (Miss. 1892).

The circuit court has no other jurisdiction than such as the justice had. *Glass v. Moss*, 2 Miss. 519, 1837 Miss. LEXIS 9 (Miss. 1837); *Crapoo v. Grand Gulf*, 17

Miss. 205, 1848 Miss. LEXIS 4 (Miss. 1848); *Stier v. Surget*, 18 Miss. 154, 1848 Miss. LEXIS 67 (Miss. 1848); *Scofield v. Pensons*, 26 Miss. 402, 1853 Miss. LEXIS 108 (Miss. 1853), overruled, *Pittman v. Chrisman*, 59 Miss. 124, 1881 Miss. LEXIS 82 (Miss. 1881); *Richardson v. Davis*, 59 Miss. 15, 1881 Miss. LEXIS 64 (Miss. 1881); *Askew v. Askew*, 49 Miss. 301, 1873 Miss. LEXIS 115 (Miss. 1873).

4. Appeals to Supreme Court.

Appeal from circuit court of case arising in justice court held not allowable, where not allowed by circuit court or Supreme Court judge. *Gray v. Crump*, 162 Miss. 251, 139 So. 463, 1932 Miss. LEXIS 138 (Miss. 1932), overruled in part, *Jones v. City of Ridgeland*, 48 So. 3d 530, 2010 Miss. LEXIS 604 (Miss. 2010).

In case originating in justice court where plaintiff's demand exceeds \$50, and on appeal to circuit court, he recovers less than \$50 he may appeal to the Supreme Court, if the difference between demand and judgment exceeds \$50. *Home Ins. Co. v. McFarland*, 142 Miss. 555, 107 So. 383, 1926 Miss. LEXIS 77 (Miss. 1926).

Amount in controversy on appeal by defendant from judgment for plaintiff in circuit court for \$25 does not exceed \$50 necessary for appeal to Supreme Court, though in justice court, plaintiff had judgment for \$150. *Kelley v. Ladies' Aid Soc.*, 140 Miss. 580, 106 So. 627, 1926 Miss. LEXIS 479 (Miss. 1926).

Where Supreme Court is without jurisdiction, it will, of its own motion, raise it, and dismiss appeal. *Kelley v. Ladies' Aid Soc.*, 140 Miss. 580, 106 So. 627, 1926 Miss. LEXIS 479 (Miss. 1926).

No appeal can be had where the judgment is for only \$50. *City of Pass Christian v. Lizana*, 106 Miss. 470, 64 So. 209, 1913 Miss. LEXIS 157 (Miss. 1913).

Appeal to Supreme Court from circuit court in a case originating in justice court will be dismissed where the judgment appealed from is less than \$50. *Leake County v. Carr*, 100 Miss. 91, 56 So. 345, 1911 Miss. LEXIS 25 (Miss. 1911).

An appeal lies to the Supreme Court from the judgment of a circuit court for \$50, in a cause brought therein, this section [Code 1942, § 1201] limiting the

right of appeal to cases where the judgment exceeds said sum, having reference only to suits begun before justices of the peace. *Liles v. Cawthorn*, 78 Miss. 559, 29 So. 834, 1900 Miss. LEXIS 178 (Miss. 1900).

Where the property claimed by a claimant exceeds \$50 in value, and on appeal from a justice court has been subjected by the circuit court to an execution for more than that sum, the Supreme Court has jurisdiction of an appeal by the claimant, although the amount in the controversy in the original suit was less than \$50. *Andrews v. Partee*, 79 Miss. 80, 29 So. 788, 1901 Miss. LEXIS 9 (Miss. 1901).

If on appeal from the circuit court the record shows the amount in controversy to be below its original jurisdiction and contains nothing to show that the case originated in a justice court, the Supreme Court will reverse the judgment and dismiss the proceedings in the circuit court, leaving the judgment in the justice court, if any, to stand. *Andrews v. Wallace*, 72 Miss. 291, 16 So. 204, 1894 Miss. LEXIS 64 (Miss. 1894).

If the circuit court judgment be less than fifty dollars, an appeal cannot be taken by the defendant to the Supreme Court, and this even if the amount demanded and recovered in the justice's court be greater. *Ward v. Scott*, 57 Miss. 826, 1880 Miss. LEXIS 71 (Miss. 1880); *Wimbush v. Chinault*, 58 Miss. 234, 1880 Miss. LEXIS 113 (Miss. 1880).

If the plaintiff recover verdict for more than fifty dollars, he cannot remit the excess for the purpose of, and thereby prevent the defendant from, appealing; but if, on motion for a new trial before judgment, the plaintiff enter a remittitur because the court expressed the opinion that the judgment was excessive, the defendant will not be entitled to an appeal. *Wimbush v. Chinault*, 58 Miss. 234, 1880 Miss. LEXIS 113 (Miss. 1880).

5. —Amount in controversy, determination of.

The amount in controversy is limited to the principal of the claim, exclusive of interest, in determining the minimum amount requisite to an appeal from justice court to the Supreme Court. *Gardner v.*

Bookout, 200 Miss. 158, 26 So. 2d 343, 1946 Miss. LEXIS 276 (Miss. 1946).

In replevin action in justice of peace court to recover horse worth \$50, in which defendant filed counterclaim for \$185 for wrongful suing out of writ, counterclaim gave Supreme Court jurisdiction of appeal. *Garner v. Broom*, 161 Miss. 734, 138 So. 336, 1931 Miss. LEXIS 309 (Miss. 1931).

Difference between amount sued on in justice court, with interest, and amount claimed by defendant by way of recoupment, held not amount involved, as respects Supreme Court's jurisdiction of appeal. *James v. Williams Furniture Co.*, 161 Miss. 358, 137 So. 101, 1931 Miss. LEXIS 266 (Miss. 1931).

Jurisdictional amount may be supplied by counterclaim. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293, 1927 Miss. LEXIS 176 (Miss. 1927).

In an appeal in replevin the amount in controversy is determined by the value of the property replevied. *Jacobs v. Jackson*, 128 Miss. 434, 91 So. 36, 1922 Miss. LEXIS 126 (Miss. 1922); *Gresham v. Kennedy*, 128 Miss. 469, 91 So. 129, 1922 Miss. LEXIS 131 (Miss. 1922).

The jurisdiction of the Supreme Court of an issue made before a justice of the peace under Code 1906, § 2866, after seizure under a landlord's attachment for rent or supplies, is determinable on his appeal by the sum for which he might have obtained judgment, there having been no trial on the merits in the circuit court. *Schlicht v. Callicott*, 76 Miss. 487, 24 So. 869, 1898 Miss. LEXIS 102 (Miss. 1898).

Upon an appeal to the Supreme Court from a judgment of the circuit court in favor of a landlord in an action of replevin by the tenant for property distrained for rent, begun in a justice court, the amount in controversy is determined by the rent due as adjudged by the circuit court, and not by the value of the property seized. *Bittle v. Paine*, 74 Miss. 494, 21 So. 250, 1896 Miss. LEXIS 169 (Miss. 1896).

The limit provided for an appeal has reference to the debt, demand, or damages in litigation, and not to interest on the judgment, or the costs or per centum added to the judgment. *N. O., J. & G. N. R.*

Co. v. Evans, 49 Miss. 785, 1874 Miss. LEXIS 13 (Miss. 1874); Jackson v. Whitfield, 51 Miss. 202, 1875 Miss. LEXIS 35 (Miss. 1875); Ward v. Scott, 57 Miss. 826, 1880 Miss. LEXIS 71 (Miss. 1880); Davis v. Holberg, 59 Miss. 362, 1882 Miss. LEXIS 115 (Miss. 1882); Kiernan v. Germaine, 62 Miss. 75, 1884 Miss. LEXIS 22 (Miss. 1884); James v. Williams Furniture Co., 161 Miss. 358, 137 So. 101, 1931 Miss. LEXIS 266 (Miss. 1931).

6. —Consent of parties, effect of.

Where amount in controversy is insufficient under the statute to give Supreme Court jurisdiction, it cannot be given it by consent of parties. Kelley v. Ladies' Aid Soc., 140 Miss. 580, 106 So. 627, 1926 Miss. LEXIS 479 (Miss. 1926); James v. Williams Furniture Co., 161 Miss. 358, 137 So. 101, 1931 Miss. LEXIS 266 (Miss. 1931).

7. Effect of appeal.

Where a judgment rendered in the court of a justice of the peace against a garnishee was later set aside by the justice without authority, and an appeal subsequently taken, the trial in the circuit court should have been de novo, the judgment there rendered superseding that of the justice of the peace, and should have been that the petition be dismissed, leaving the original judgment rendered by the justice of the peace in the same force and effect it had been when the petition for setting it aside was filed. Lott v. Illinois C. R. Co., 193 Miss. 443, 10 So. 2d 96, 1942 Miss. LEXIS 125 (Miss. 1942).

Justice court's judgment is vacated or superseded by appeal to circuit court, although revived by dismissal of appeal. Lucedale Commercial Co. v. Strength, 163 Miss. 346, 141 So. 769, 1932 Miss. LEXIS 50 (Miss. 1932).

8. Proceedings on appeal.

Debtors could not simply fail to defend a suit to collect a debt and also fail to appeal the default judgment entered against them, and then file suit and argue that the judgment, though not in dispute, was the result of fraud or abuse of process, especially in circumstances where their allegations of fraud and abuse of process were

without merit; the proper avenue available to attack the judgment, the attorney's fees awarded, and the alleged fraud, was to have defended the action in justice court or to make a timely appeal of the judgment to the circuit court, thus, the debtors were procedurally barred by the doctrine of res judicata from bringing any action concerning the default judgments of the justice court. Franklin Collection Serv. v. Stewart, 863 So. 2d 925, 2003 Miss. LEXIS 870 (Miss. 2003).

Recoupment may be interposed for the first time on the appeal to the circuit court, and no pleading is necessary. Criss v. Bailey, 243 Miss. 130, 137 So. 2d 160, 1962 Miss. LEXIS 324 (Miss. 1962).

On appeal to circuit court from judgment against defendant in civil action in justice of peace court, defendant cannot challenge jurisdiction of justice of peace over his person when he appeared in justice court, offered evidence and argued case before entry of judgment. Beck v. Kersh, 208 Miss. 879, 45 So. 2d 730, 1950 Miss. LEXIS 309 (Miss. 1950).

Criminal case, in which justice was disqualified because of interest, must, on appeal to county court, be tried de novo. State v. Dearman, 152 Miss. 6, 118 So. 349, 1928 Miss. LEXIS 204 (Miss. 1928).

Where appeal bond correctly recites appeal to the proper circuit court district, but appeal papers filed in other court district, it is error to dismiss the case. Woods v. Speer, 127 Miss. 593, 90 So. 322, 1921 Miss. LEXIS 262 (Miss. 1921).

Where next term of circuit court after trial of claimant's issue on November 13 convened on November 17, and bond and papers in the case were not filed in the circuit court at that term, and there was no proceeding to require the justice to send them up, a motion in the following March term to dismiss the appeal for want of prosecution was properly denied. Dalee Bros. v. Wigginton, 111 Miss. 749, 72 So. 149, 1916 Miss. LEXIS 383 (Miss. 1916).

Appellant is not precluded from making an attack from the judgment rendered by a justice of the peace merely because he has executed an appeal bond to the circuit court. Adams v. Fidelity Mut. L. Ins. Co., 94 Miss. 433, 49 So. 119, 1909 Miss. LEXIS 368 (Miss. 1909).

A defendant who has been tried and convicted of a misdemeanor in the circuit court, on his appeal from the judgment of a justice of the peace, cannot complain on motion in arrest of judgment of the absence of a duly certified copy of the proceedings of the justice of the peace, if there be on file in the circuit court the affidavits on which he was tried, a copy of the judgment of the justice of the peace convicting him, and his appeal bond. *Calhoun v. State*, 86 Miss. 553, 38 So. 660, 1905 Miss. LEXIS 70 (Miss. 1905).

Appeals from judgments of justices of the peace are to be tried anew, as if never tried before, and any evidence may be set up for the first time in the circuit court. *Illinois C. R. R. Co. v. Andrews*, 61 Miss. 474, 1884 Miss. LEXIS 115 (Miss. 1884); *Amory Independent Tel. Co. v. Cox*, 103 Miss. 541, 60 So. 641, 1912 Miss. LEXIS 196 (Miss. 1912).

9. —Amendment.

Circuit court is authorized on appeal from justice of the peace to allow amendments to answers of garnishees, changing admission of indebtedness to attachment or judgment debtor to denial of such indebtedness. *Wymond v. Gaude Service, Inc.*, 168 Miss. 678, 152 So. 60, 1934 Miss. LEXIS 361 (Miss. 1934).

Garnishee may amend answer in circuit court after appeal thereto from justice court. *Green v. Western Union Tel. Co.*, 146 Miss. 703, 111 So. 750, 1927 Miss. LEXIS 218 (Miss. 1927).

Denial of motion to dismiss appeal for insufficient bond, without amendment of bond on request made and allowed, was error. *De Laval Separator Co. v. Cutts*, 142 Miss. 379, 107 So. 522, 1926 Miss. LEXIS 87 (Miss. 1926).

Statement of cause of action may be amended after appeal to circuit court to show true amount of damage. *Harper v. Adams*, 141 Miss. 806, 106 So. 354, 1925 Miss. LEXIS 222 (Miss. 1925).

Circuit court will not dismiss cause appealed from justice court because plaintiff without authority of court added item accruing subsequent to filing suit. *Hobbs Auto Co. v. Jones*, 140 Miss. 610, 105 So. 764, 1925 Miss. LEXIS 296 (Miss. 1925).

On appeal from justice court to circuit court, amount cannot be amended so as to

increase the amount above justice court's jurisdiction. *Hobbs Auto Co. v. Jones*, 140 Miss. 610, 105 So. 764, 1925 Miss. LEXIS 296 (Miss. 1925).

Suit in partnership name may be amended in the circuit court by inserting names of partners, and refusal to allow such amendment on application therefor is reversible error. *McCullar & Co. v. Mink*, 121 Miss. 829, 83 So. 907, 1920 Miss. LEXIS 124 (Miss. 1920).

10. —Parties.

Circuit court on appeal from justice may add other joint owner as coplaintiff. *American R. E. Co. v. Roby*, 129 Miss. 120, 91 So. 449, 1922 Miss. LEXIS 7 (Miss. 1922).

11. —Evidence.

Record certified to circuit court on appeal from justice's court, including copy of judgment of justice, is competent evidence in circuit court. *Broadus v. Calhoun*, 139 Miss. 28, 103 So. 808, 1925 Miss. LEXIS 125 (Miss. 1925).

Evidence in support of a set-off, filed for the first time in the circuit court, should not be admitted, it being a cross-action. *Marx v. Trussell*, 50 Miss. 498, 1874 Miss. LEXIS 83 (Miss. 1874).

12. —Judgment.

On appeal to circuit court from judgment against defendant in justice of peace court in suit for breach of warranty, arising out of contract, amount involved being definite and fixed sum, on motion by plaintiff for default judgment, court properly entered judgment for amount sued for without awarding writ of inquiry and having jury assess amount of damages, defendant never having filed any kind of plea or denial. *Beck v. Kersh*, 208 Miss. 879, 45 So. 2d 730, 1950 Miss. LEXIS 309 (Miss. 1950).

Where defendant did not prosecute a cross-appeal from a judgment assessing him with costs of the appeal to circuit court and the cost of the trial de novo therein, such judgment is final, even if the cause should be affirmed. *Douglas v. Warren*, 44 So. 2d 853 (Miss. 1950).

Judgment against appellant on appeal from justice need not be against his sure-

ties also, but, if against one surety must also be against the other. *Helmer Bros. v. Hastings*, 142 Miss. 403, 107 So. 551, 1926 Miss. LEXIS 95 (Miss. 1926).

Judgment in attachment suit for plaintiff affirmed on debt issue on appeal should be against both defendant and surety on appeal bond. *Laurel Mills v. Ward*, 137 Miss. 221, 102 So. 263, 1924 Miss. LEXIS 221 (Miss. 1924).

A judgment against appellant and only one of his two sureties is void and may be vacated on subsequent motion and the cause reinstated for hearing. *Leathers v. Fred O. Howe & Co.*, 108 Miss. 1, 66 So. 280, 1914 Miss. LEXIS 158 (Miss. 1914).

A surety on an appeal bond, against whom judgment has been jointly rendered, is a "codebtor" within the bankrupt act. *Bailey v. Reeves*, 102 Miss. 438, 59 So. 802, 1912 Miss. LEXIS 71 (Miss. 1912).

13. —Damages.

Where there was a judgment in the justice of the peace court for \$85 from which defendant prosecuted an appeal to the circuit court, where there is a jury verdict and judgment, also for \$85, 10 per centum damages should have been added by the circuit court. *Harper v. Adams*, 141 Miss. 806, 106 So. 354, 1925 Miss. LEXIS 222 (Miss. 1925).

The circuit court rendered a judgment for the plaintiff for the full amount of his claim plus ten per cent damages. This was an error, as this section [Code 1942, § 1201] has no application to an appeal of a defeated plaintiff. *Galloway v. Champ- lin*, 101 Miss. 822, 58 So. 710, 1911 Miss. LEXIS 179 (Miss. 1911).

Where defendant's appeal is dismissed the circuit court should enter judgment against appellant and the sureties on his bond for the amount for which judgment was rendered by the justice of the peace, with statutory damages and costs. *Jacobs*

v. Johnson, 84 Miss. 450, 36 So. 544, 1904 Miss. LEXIS 70 (Miss. 1904).

It is only where the defendant appeals to the circuit court and plaintiff there recovers as much or more than the judgment in the justice court that damages can be added to the judgment. *Louisville & N. R. Co. v. Pool*, 72 Miss. 487, 16 So. 753, 1894 Miss. LEXIS 109 (Miss. 1894).

14. Nonsuit or dismissal of appeal.

In an appeal from an entry of a default judgment by a justice court, a circuit court, in dismissing the appeal, addressed a husband's claim that he had not been properly served by a collection agency. The circuit court correctly found that not only had the husband failed to produce credible evidence to support his claim, but that the husband failed to timely challenge the service of process and, thus, waived his right to dispute the sufficiency of the process. *Laffitte v. Southern Fin. Sys.*, 30 So. 3d 1236, 2009 Miss. App. LEXIS 599 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 153 (Miss. 2010).

In an appeal from an entry of a default judgment by a justice court, a circuit court, in dismissing the appeal, addressed a wife's claim that, while she had been personally served with process, the summons itself was defective. The circuit court correctly found that the wife had waived her right to dispute the sufficiency of the process by failing to timely challenge the service of process. *Laffitte v. Southern Fin. Sys.*, 30 So. 3d 1236, 2009 Miss. App. LEXIS 599 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 153 (Miss. 2010).

On appeal from justice court to circuit court, plaintiff could suffer voluntary nonsuit without thereby reinstating justice court's judgment so as to render it res judicata. *Lucedale Commercial Co. v. Strength*, 163 Miss. 346, 141 So. 769, 1932 Miss. LEXIS 50 (Miss. 1932).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d, Appellate Review §§ 578-583.

CJS.

5 C.J.S., Appeal and Error §§ 886-899.

§ 11-51-93. Certiorari proceedings in circuit court.

All cases decided by a justice of the peace, whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari, which shall operate as a supersedeas, the party, in all cases, giving bond, with security, to be approved by the judge or clerk of the circuit court, as in cases of appeal from justices of the peace; and in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. In case of an affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same be apparent, or may then try the cause anew on its merits, and may in proper cases enter judgment on the certiorari or appeal bond, and shall, when justice requires it, award restitution. The clerk of the circuit court, on the issuance of a certiorari, shall issue a summons for the party to be affected thereby; and, in case of nonresidents, he may make publication for them as in other cases.

HISTORY: Codes, Hutchinson's 1848, ch. 50, art. 9; 1857, ch. 58, art. 28; 1871, § 1336; 1880, § 2358; 1892, § 89; 1906, § 90; Hemingway's 1917, § 72; 1930, § 72; 1942, § 1206.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Powers of county judge to order issuance of writs of certiorari, see § 9-9-23.

Costs in cases of certiorari from inferior tribunals, see § 11-53-53.

Restrictions on who may sign bonds and procedural requirements for appeals to circuit courts, see MRCrP 1.07, 18.1, and 29.1 through 29.5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.
3. Issuance of certiorari in general.
4. Matters appealable by certiorari.
5. Limit of time.
6. Notice.
7. Effect of certiorari.
8. Matters for review.
9. Proceedings on certiorari.
10. —Pleading.
11. —Evidence.
12. —Judgment.
13. Dismissal of certiorari.

1. In general.

A former university employee could not bring a breach of contract action against

the university following the termination of his employment where he had no written contract of employment; the employee was afforded statutory protections and procedures for the purpose of appealing employment decisions and was required to seek review by writ of certiorari. *Smith v. Univ. of Miss.*, 797 So. 2d 956, 2001 Miss. LEXIS 129 (Miss. 2001).

Notions of due process would be impugned by requiring a state university employee to pursue a breach of contract claim against the university's personnel action review board in an administrative tribunal ultimately answerable to the board itself and subject to the limited review of the circuit court allowed under this section. *Board of Trustees of State Insts. of Higher Learning v. Brewer*, 732

So. 2d 934, 1999 Miss. LEXIS 59 (Miss. 1999).

Since neither Rule 7.03 nor any other part of the Uniform Criminal Rules of Circuit Court Practice has abolished or supplanted the certiorari procedure, the writ of certiorari is still available to obtain a full review in the circuit court to one convicted of a misdemeanor in the justice court. *Merritt v. State*, 497 So. 2d 811, 1986 Miss. LEXIS 2729 (Miss. 1986).

Application for a writ of certiorari under § 11-51-93 is addressed to the sound discretion of the circuit court. *Merritt v. State*, 497 So. 2d 811, 1986 Miss. LEXIS 2729 (Miss. 1986).

One against whom judgment is recovered by default in justice court without process can enjoin execution or take cause to circuit court on certiorari. *Turner v. Williams*, 162 Miss. 258, 139 So. 606, 1932 Miss. LEXIS 312 (Miss. 1932).

Proceeding by certiorari to remove a cause from justice court to circuit court is not commencement of suit, but more in nature of a writ of error to have reviewed record of cause determined in inferior court. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146, 1926 Miss. LEXIS 136 (Miss. 1926).

A writ issued by the circuit court to compel a justice to transmit a certified copy of the record and the original papers when an appeal has been perfected from a judgment of the justice is not a writ of certiorari within the section. *Redus v. Gamble*, 85 Miss. 165, 37 So. 1010, 1904 Miss. LEXIS 124 (Miss. 1904).

The remedy by certiorari is merely to secure correction of the judgment and when secured there is no liability on the sureties on the bond, neither is the judgment debtor liable for the costs accruing. *McInnis v. Graves*, 80 Miss. 632, 31 So. 902, 1902 Miss. LEXIS 269 (Miss. 1902).

2. Jurisdiction.

Statute's bond requirement is jurisdictional; regardless of whether the bond required is a cost or supersedeas bond, the bond is jurisdictional because the statute requires it. *Avery v. Univ. of Miss.*, — So. 3d —, 2019 Miss. App. LEXIS 194 (Miss. Ct. App. May 7, 2019).

Cost bond was required in the appeal of an employee's termination as it was juris-

dictional, and the employee's payment of court fees and costs did not satisfy the requirement. *Avery v. Univ. of Miss.*, — So. 3d —, 2019 Miss. App. LEXIS 194 (Miss. Ct. App. May 7, 2019).

Failure to post the required appeal bond is a jurisdictional issue. *Board of Trustees of State Insts. of Higher Learning v. Brewer*, 732 So. 2d 934, 1999 Miss. LEXIS 59 (Miss. 1999).

An appeal from a circuit court order reversing an order of the Employee Appeals Board, which granted a state service employee's motion to collaterally estop her employer-the Mississippi Department of Corrections (MDOC)-from relitigating factual issues decided in the employee's unemployment claim, would be dismissed for lack of jurisdiction since no appeal to the circuit court by an administrative agency is authorized by § 25-9-132, and the MDOC did not comply with the statutory requisites for certiorari pursuant to §§ 11-51-93 and 11-51-95 where the MDOC filed only a brief in support of review and failed to file a petition supported by affidavit. *Bertucci v. Mississippi Dep't of Corrections*, 597 So. 2d 643, 1992 Miss. LEXIS 157 (Miss. 1992).

Circuit court was without jurisdiction to order the reinstatement of a park manager who had filed no appeal bond with his petition to the circuit court for appeal and for writ of certiorari. *Grand Gulf Military Monument Com. v. Cox*, 492 So. 2d 287, 1986 Miss. LEXIS 2529 (Miss. 1986).

The Circuit Court erred in granting petitioner's writ of certiorari without his having filed a bond, pursuant to the requirements of §§ 11-51-95, 11-51-93 and 11-51-53 [Repealed], since the failure of petitioner to file the appeal bond within the statutory period defeated the jurisdiction of the Circuit Court to act. *Mississippi State Personnel Bd. v. Armstrong*, 454 So. 2d 912, 1984 Miss. LEXIS 1842 (Miss. 1984).

If the justice's court had no jurisdiction, the circuit court has none. *McDugle v. Filmer*, 79 Miss. 53, 29 So. 996, 1901 Miss. LEXIS 24 (Miss. 1901).

A justice of the peace cannot serve a summons and a judgment by default based on a summons served by him is void and on certiorari the circuit court acquires

no jurisdiction. *McDugle v. Filmer*, 79 Miss. 53, 29 So. 996, 1901 Miss. LEXIS 24 (Miss. 1901).

Unless the amount in controversy exceed \$50 in cases brought by certiorari from a justice of the peace to the circuit court, an appeal will not be allowed from the circuit court in such case to the Supreme Court. *O'Leary v. Harris*, 50 Miss. 13, 1874 Miss. LEXIS 16 (Miss. 1874).

3. Issuance of certiorari in general.

Since Miss. Unif. Cir. & Cty. R. 5.08 involved a supersedeas bond, it was not applicable in the appeal of an employee's termination; the bond required in Miss. Code Ann. § 11-51-93 does not appear to be a supersedeas bond, but a cost bond. *Avery v. Univ. of Miss.*, — So. 3d —, 2019 Miss. App. LEXIS 194 (Miss. Ct. App. May 7, 2019).

A motorist whose operator's license was revoked following his conviction for driving while intoxicated was not entitled to proceed by writ of certiorari in the circuit court to review the action of the commissioner of public safety when he had previously failed to exhaust the administrative remedies provided by Code 1942, § 8105. *Mississippi State Dep't of Public Safety v. Berry*, 217 So. 2d 11, 1968 Miss. LEXIS 1249 (Miss. 1968); *Mississippi State Dep't of Public Safety v. Brown*, 217 So. 2d 13, 1968 Miss. LEXIS 1251 (Miss. 1968).

Where the supreme court affirmed a judgment of the circuit court dismissing the appeal of defendant from conviction in a mayor's court, to be issued "unless appellant shall perfect the record of the certificate of the mayor's court," and the circuit court dismissed appellant's motion thereafter to reinstate the cause in the circuit court and to issue a writ of certiorari to compel the mayor to certify the transcript to the circuit court on the ground that the writ was not applied for within the six months allowed by law, such appellant was entitled to have the cause reinstated in the circuit court and to an issuance of the writ of certiorari, since the fact remained that the appellant had never been able to get a trial of the cause in the circuit court on its merits. *Fassman v. Centreville*, 184 Miss. 520, 186 So. 641, 1939 Miss. LEXIS 67 (Miss. 1939).

In petition for certiorari to review order of supervisors, it is only where ground for reversal appears from the record that circuit court can grant hearing on merits. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Writ to review order of supervisors ordering an election on the question of prohibiting sale and distribution of beer and wine in the county, held improvidently issued where exhibits attached to petition recited all necessary jurisdictional facts entitling board to act. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Writ of certiorari to review order of supervisors, although improperly issued because of failure to show good cause, held not void where judge had jurisdiction to issue it. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Certiorari to remove to circuit court case decided by justice should be denied, no question of law appearing for review. *Henderson v. Grantham*, 148 Miss. 521, 114 So. 323, 1927 Miss. LEXIS 24 (Miss. 1927).

The writ cannot properly issue without good grounds shown by petition, but appearance in the circuit court, and entry upon trial without noticing the defects in the petition is a waiver of all objections to the writ. *Moore v. Ernst*, 54 Miss. 642, 1877 Miss. LEXIS 66 (Miss. 1877).

Where a certiorari has been improperly awarded it may be dismissed by the circuit court upon motion. *Leech v. Irving*, 3 Miss. 887, 1838 Miss. LEXIS 73 (Miss. 1838).

4. Matters appealable by certiorari.

Due to the absence of a statutory right of appeal and the hospitals lacked a full, plain, complete, and adequate remedy at law, the chancery court had jurisdiction over the hospitals' appeals challenging the Division of Medicaid's recalculation of their Medicaid outpatient rates for fiscal year 2001. *Miss. Div. of Medicaid v. Alliance Health Ctr.*, 174 So. 3d 254, 2015 Miss. LEXIS 461 (Miss. 2015).

Availability of a petition for a writ of certiorari under Miss. Code Ann. § 11-51-95 (Rev. 2012) was not the equivalent

of a statutory right of appeal where the plain language of Miss. Code Ann. § 11-51-93 (Rev. 2012) and case law made certiorari review discretionary, and thus, appellate review was not guaranteed. *Miss. Div. of Medicaid v. Alliance Health Ctr.*, 174 So. 3d 254, 2015 Miss. LEXIS 461 (Miss. 2015).

Although the circuit court did not have the authority, under § 25-9-132, to hear the Department of Wildlife Conservation's (DWC) appeal of a final decision of the Employee Appeals Board (EAB), limited judicial review via writ of certiorari was available to the DWC under § 11-51-93, since the EAB is a "tribunal inferior" within the meaning of § 11-51-95. *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586, 1990 Miss. LEXIS 789 (Miss. 1990).

Order of county board of supervisors providing for election to determine whether sales of beer and light wines should be abolished held appealable by certiorari. *Mohundro v. Board of Sup'rs*, 174 Miss. 512, 165 So. 124, 1936 Miss. LEXIS 194 (Miss. 1936).

Appellant may have writ of certiorari issued to trial court clerk to send up parts omitted from transcript. *Aluminum Cooking Utensil Co. v. Shivers*, 149 Miss. 197, 115 So. 345, 1928 Miss. LEXIS 27 (Miss. 1928).

Certiorari lies to the circuit court to review assessments of board of railroad assessors, and test the legality thereof. *Illinois C. R. Co. v. Miller*, 141 Miss. 223, 106 So. 636, 1926 Miss. LEXIS 436 (Miss. 1926).

Where minutes of court show that a pleading and exhibit were filed and left out of the record on appeal, certiorari will be granted to bring such papers up as a part of the record. It is incompetent to contradict minutes by evidence of the clerk and attorneys or other officers of the court. *Yazoo & M. V. R. Co. v. M. Levy & Sons*, 141 Miss. 196, 106 So. 524, 1925 Miss. LEXIS 230 (Miss. 1925).

Writ of certiorari will not lie to review order of railroad commission fixing telephone rates. *Cumberland Tel. & Tel. Co. v. State*, 135 Miss. 835, 100 So. 378, 1924 Miss. LEXIS 71 (Miss. 1924).

If justice of the peace, on appeal to the circuit court, refuses to approve the ap-

peal bond and send up record, it may be brought up by certiorari. *Barrett v. Pickett*, 117 Miss. 825, 78 So. 777, 1918 Miss. LEXIS 227 (Miss. 1918).

Certiorari may be had to correct mistaken findings of fact by the railroad commission induced by an error of law apparent on the record or the finding of a fact contrary to law or the making of an order beyond its power, although this section confines the courts on certiorari to questions of law appearing on the face of the record and proceedings. *Gulf & S. I. R. Co. v. Adams*, 85 Miss. 772, 88 Miss. 772, 38 So. 348, 1904 Miss. LEXIS 125 (Miss. 1904).

An interlocutory order entered by a justice of the peace will not warrant the carrying of the case by certiorari to the circuit court. *Morris v. Shryock & Rowland*, 50 Miss. 590, 1874 Miss. LEXIS 98 (Miss. 1874).

5. Limit of time.

The limitation of time within which cases may be removed to the circuit court by certiorari applies to both civil and criminal cases. *Ex parte Grubbs*, 80 Miss. 288, 31 So. 741, 1902 Miss. LEXIS 243 (Miss. 1902).

6. Notice.

Where, on return of writ of garnishment, claim of exemption was allowed, and plaintiff secured writ of certiorari within proper time, issuing summons only for judgment defendant, failure to issue summons on garnishee within six-month statutory limit held not to bar proceedings as to him since petition and bond were filed and writ issued within statutory limits. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146, 1926 Miss. LEXIS 136 (Miss. 1926).

The defendant in a certiorari proceeding must have notice. *Copeland v. Pate*, 7 Miss. 275, 1842 Miss. LEXIS 36 (Miss. 1842).

7. Effect of certiorari.

Where a judgment is obtained in a justice court and real estate of the defendant levied upon, and the defendant thereafter removes the case to the circuit court by certiorari, which operates as a super-

sedeas, the lien of such judgment acquired by the levy is not destroyed but only stayed and may be enforced when the certiorari is dismissed. *Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, 1912 Miss. LEXIS 29 (Miss. 1912).

8. Matters for review.

Circuit court properly refused a defendant's request for certiorari review of his trial, in absentia, for refusing to give a breath test because Miss. Code Ann. § 11-51-93 provided for certiorari review only when a pure question of law was presented; defendant was citing to a document in an attempt to support his argument that the municipal court date was changed, but the document was not part of the municipal court record. *Lott v. City of Bay Springs*, 960 So. 2d 525, 2006 Miss. App. LEXIS 842 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 405 (Miss. 2007).

It may be doubted that the contention that the verdict in the justice court was against the weight of the evidence is one which presents a sort of pure question of law reviewable on certiorari by means of the procedure authorized in § 11-51-93. *Merritt v. State*, 497 So. 2d 811, 1986 Miss. LEXIS 2729 (Miss. 1986).

Certiorari is statutory remedy designed for purpose of bringing into review acts of inferior tribunal upon record made by such tribunal on questions of law, but upon hearing in reviewing court evidence may be heard to make manifest the error of law committed by inferior tribunal. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902, 1949 Miss. LEXIS 438 (Miss. 1949).

Petitioner for writ of certiorari to review proceedings of board of supervisors of county divided into two court districts has right to show that board has never adopted order for holding of regular meetings in second district on second Monday of each month and on failure to make such showing he cannot contend orders of board of supervisors are void because they fail to show lawful authority for holding meetings at which orders were adopted. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902, 1949 Miss. LEXIS 438 (Miss. 1949).

Where the circuit court petitioned by way of certiorari, after a decree in chancery court validating the issuance of county funding bonds, was confined to the same record, made by the board of supervisors, which the chancery court had before it in the validation proceedings, disposition of an appeal from the chancery court would not be stayed. *In re Validation of Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26, 1940 Miss. LEXIS 221 (Miss. 1940).

Statute permitting circuit court on certiorari to review only questions of law appearing on face of record and proceedings held not to authorize examination of transcript of evidence on review of Railroad Commission's decision granting certificate of convenience and necessity. *Yazoo & M. V. R. Co. v. Mississippi R. Com.*, 169 Miss. 131, 152 So. 649, 1934 Miss. LEXIS 18 (Miss. 1934).

Word "proceedings" within Code includes only such proceedings as must appear of record, and does not include the evidence on which the inferior tribunal acted. *Yazoo & M. V. R. Co. v. Mississippi R. Com.*, 169 Miss. 131, 152 So. 649, 1934 Miss. LEXIS 18 (Miss. 1934).

Circuit court and Supreme Court were confined to examination of questions of law arising or appearing on face of record and proceedings in court of justice of peace. *Simpson v. Phillips*, 164 Miss. 256, 141 So. 897, 1932 Miss. LEXIS 208 (Miss. 1932).

Under this section [Code 1942, § 1206], the court to which a case has been removed by a writ of certiorari is confined to the examination of questions of law arising or appearing on the face of the record and proceedings. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 489, 120 So. 173, 1929 Miss. LEXIS 2 (Miss. 1929); *Simpson v. Phillips*, 164 Miss. 256, 141 So. 897, 1932 Miss. LEXIS 208 (Miss. 1932); *Federal Credit Co. v. Rogers*, 166 Miss. 559, 148 So. 353, 1933 Miss. LEXIS 384 (Miss. 1933); *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938); *In re Validation of Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26, 1940 Miss. LEXIS 221 (Miss. 1940); *Viator v. State Tax Com.*, 193 Miss. 266, 5 So. 2d 487, 1942 Miss. LEXIS 78

(Miss.), cert. denied, 316 U.S. 643, 62 S. Ct. 1036, 86 L. Ed. 1728, 1942 U.S. LEXIS 732 (U.S. 1942).

Under writ of certiorari from circuit court to county court, return should not have included transcript of evidence. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114, 1929 Miss. LEXIS 34 (Miss. 1929).

9. Proceedings on certiorari.

Judgment creditor, having issued certiorari within time after exemption allowed on return of garnishment, not estopped to prosecute the writ because garnishee had paid out money in its hands before filing petition. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146, 1926 Miss. LEXIS 136 (Miss. 1926).

Circuit court should not award trial by jury to determine whether garnishee had or had not made answer in justice court exempting him from judgment by default in plaintiff's favor, although record, failing to contain answer, showed a notation by the justice that the garnishee's answer denied all indebtedness, followed by a default judgment against him. *Arky v. Cameron*, 92 Miss. 632, 46 So. 54, 1908 Miss. LEXIS 198 (Miss. 1908).

It is the duty of the party who sues out a certiorari to appear in the circuit court and point out the errors if any exist; and if he fail to do so, he cannot complain in the Supreme Court of a judgment by default affirming the justice's judgment rendered in the circuit court. *O'Leary v. Bolton*, 50 Miss. 172, 1874 Miss. LEXIS 41 (Miss. 1874).

10. —Pleading.

Reviewing court found no abuse of discretion in a trial court's decision to grant a writ of certiorari to the Mississippi Department of Corrections to review an order of the Employee Appeals Board requiring that an employee be reinstated even though the petition only complained about the Employee Appeals Board's decision in a general way. *Miss. Dep't of Corr. v. Smith*, 883 So. 2d 124, 2004 Miss. App. LEXIS 449 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1208 (Miss. 2004).

On petition for certiorari to review an order of a board of supervisors ordering an election on the question of prohibiting sale of beer and wine in the county, the averment of exhibits attached to petition control. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Refusal to allow amendment of pleadings, whereby it was sought to have registration books and pool books, and other records, brought up to ascertain percentage of qualified electors signing petition for election, held not error, since evidence and testimony considered by an inferior tribunal are no part of the record on certiorari. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

The circuit judge has the sole power to determine the sufficiency of the petition; its insufficiency cannot be assigned for error in the Supreme Court. *Loomis v. Commerical Bank of Columbus*, 5 Miss. 660, 1840 Miss. LEXIS 48 (Miss. 1840).

11. —Evidence.

In certiorari proceeding to review case commenced in justice court, evidence contradicting record was inadmissible. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773, 1929 Miss. LEXIS 175 (Miss. 1929).

District court could not look to evidence in case transferred from county court by writ of certiorari. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114, 1929 Miss. LEXIS 34 (Miss. 1929).

12. —Judgment.

After the election on the question of prohibiting sale and distribution of beer and wine in the county was had pursuant to order of the board of supervisors, while certiorari proceedings were pending, the court properly affirmed supervisors' order, in absence of error appearing on face of record. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Supreme court, reversing circuit court judgment reversing county court judgment, cannot render summary judgment on appeal bond carrying case from county

to circuit court. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 498, 121 So. 858, 1929 Miss. LEXIS 95 (Miss. 1929).

Judgment on certiorari reversing judgment of state tax commission held “final judgment.” *Illinois C. R. Co. v. Miller*, 141 Miss. 223, 106 So. 636, 1926 Miss. LEXIS 436 (Miss. 1926).

On certiorari, it was error to render judgment against alleged surety, when no bond was before the court. *Addington v. Ashford*, 97 So. 515 (Miss. 1923).

In replevin in justice’s court, where defendant asked writ of certiorari in the circuit court, the proper judgment to be entered was either one of affirmance or of reversal, and if reversal a proper judgment entry was required to be made under this section. *Williams v. Williams*, 117 Miss. 251, 78 So. 152, 1918 Miss. LEXIS 172 (Miss. 1918).

Circuit court on certiorari should reverse judgment against and discharge garnishee who has filed, before justice, an uncontested answer denying liability. *Hattiesburg Trust & Banking Co. v. Hood*, 97 Miss. 340, 52 So. 790, 1910 Miss. LEXIS 274 (Miss. 1910).

When on reversal it is apparent from the record and proceedings alone what final judgment the justice should have entered, the circuit court should enter that judgment. Otherwise there must be trial anew on the whole merits. *Evans v. Southern R. Co.*, 74 Miss. 230, 21 So. 15, 1896 Miss. LEXIS 146 (Miss. 1896).

The judgment of the circuit court if the writ were properly awarded on the petition should be either an affirmance or a reversal of the justice’s judgment and not a dismissal of the writ. *Burrow v. Sanders*, 57 Miss. 211, 1879 Miss. LEXIS 46 (Miss. 1879).

13. Dismissal of certiorari.

Trial court erred in granting a university’s motion to dismiss an employee’s appeal because the employee encountered unusual, extenuating circumstances that

thwarted her attempt to post a timely bond; the employee’s failure to post bond could be excused by extenuating circumstances because her counsel tried to meet with a judge but was advised he and other judges were recusing from the case, and after the order of recusal was entered, there was no judge available to set the bond. *Avery v. Univ. of Miss.*, — So. 3d —, 2019 Miss. App. LEXIS 194 (Miss. Ct. App. May 7, 2019).

Circuit court did not abuse its discretion by failing to grant a writ of certiorari, pursuant to Miss. Code Ann. § 11-51-93, based on an affidavit submitted by petitioner regarding broad statements made by a county prosecutor as to the prosecutor’s memory about in absentia traffic tickets in general; the circuit court did not rule the affidavit was not relevant or admissible, within the meaning of Miss. R. Evid. 406, rather the circuit court found the affidavit alone was insufficient to grant certiorari. *Abraham v. State*, 61 So. 3d 199, 2010 Miss. App. LEXIS 645 (Miss. Ct. App. 2010).

Circuit court did not abuse its discretion in denying a petition for a writ of certiorari, Miss. Code Ann. § 11-51-93, after a justice court found petitioner guilty in absentia of two traffic offenses, because petitioner did not provide the required justice court record for the circuit court to review and, as such, petitioner did not show “good cause” as to why his petition should have been granted; the record did not indicate any effort by petitioner to secure the justice court record or any evidence the justice court ever received notice of petitioner’s attempt to file an appeal of its judgment, as required by Miss. Unif. Cir. & Cty. R. 5.04. *Abraham v. State*, 61 So. 3d 199, 2010 Miss. App. LEXIS 645 (Miss. Ct. App. 2010).

The dismissal of a writ of certiorari is a bar to the granting of a new writ of the same character to the same party in the same case. *Williams v. Williams*, 34 Miss. 143, 1857 Miss. LEXIS 117 (Miss. 1857).

RESEARCH REFERENCES

ALR.

Existence of jurisdictional facts found

by inferior tribunal as subject of inquiry on certiorari. 5 A.L.R.2d 675.

Applicability of statute of limitations or doctrine of laches to certiorari. 40 A.L.R.2d 1381.

Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud. 59 A.L.R.3d 1222.

Admissibility of videotape film in evidence in criminal trial. 60 A.L.R.3d 333.

Am. Jur.

5A Am. Jur. Pl & Pr Forms (Rev), Certiorari, Forms 41 et seq. (judicial proceedings for review of inferior court proceedings).

CJS.

4 C.J.S., Appeal and Error §§ 667-669.

§ 11-51-95. Certiorari to all other inferior tribunals.

Like proceedings as provided in Section 11-51-93 may be had to review the judgments of all tribunals inferior to the circuit court, whether an appeal be provided by law from the judgment sought to be reviewed or not. However, petitions for a writ of certiorari to the circuit court for review of a decision of a municipal civil service commission created under Section 21-31-1 et seq. or Section 21-31-51 et seq. shall be filed within thirty (30) days after the entry of the judgment or order of the commission.

HISTORY: Codes, 1892, § 90; 1906, § 91; Hemingway's 1917, § 73; 1930, § 73; 1942, § 1207; Laws, 1984, ch. 521, § 5, eff from and after July 1, 1984.

Cross References — Restrictions on who may sign bonds and procedural requirements for appeals to circuit courts, see MRCrP 1.07, 18.1, and 29.1 through 29.5.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Inferior tribunals.
3. Issuance of certiorari in general.
4. Matters appealable by certiorari.
5. Effect of certiorari.
6. Matters for review.
7. Proceedings on certiorari.
8. —Pleading.
9. —Parties.
10. —Judgment.

1. In general.

Mississippi Transportation Commission (MTC) was not an inferior tribunal, and its decision to terminate the memorandum of understanding with the engineering firm was administrative in nature and not akin to a judgment rendered in a judicial or quasi-judicial proceeding; the findings were from a MTC meeting and there was no hearing on the merits, and witnesses were neither sworn in nor guided through questioning, and the minutes of the meeting were recorded on an

audio tape that was transcribed for submission to the circuit court such that the meeting was purely administrative and a writ of certiorari was not the appropriate method of appeal in this case. *Miss. Transp. Comm'n v. Eng'g Assocs.*, 39 So. 3d 6, 2009 Miss. App. LEXIS 254 (Miss. Ct. App. 2009), rev'd, 39 So. 3d 1, 2010 Miss. LEXIS 294 (Miss. 2010).

In a disciplinary case involving a fraternity and two students, because the fraternity and the students failed to strictly comply with Miss. Code Ann. § 11-51-95 by failing to file a petition of certiorari and to post a bond with security, the trial court did not have jurisdiction to hear their motion for injunctive relief against the university's decision upholding the disorderly conduct finding against the fraternity and the students and their punishment. *Jackson State Univ. v. Upsilon Epsilon Chptr. of Omega Psi Phi Fraternity, Inc.*, 952 So. 2d 184, 2007 Miss. LEXIS 181 (Miss. 2007).

The circuit court lacked jurisdiction to review a university's employment decision

where the plaintiff former employee failed to submit a petition supported by an affidavit and post a bond, with security, within six months of the decision of the university's personnel action review board per the requirements of the statute. *Smith v. Univ. of Miss.*, 797 So. 2d 956, 2001 Miss. LEXIS 129 (Miss. 2001).

The Circuit Court erred in granting petitioner's writ of certiorari without his having filed a bond, pursuant to the requirements of §§ 11-51-95, 11-51-93 and 11-51-53 [Repealed], since the failure of petitioner to file the appeal bond within the statutory period defeated the jurisdiction of the Circuit Court to act. *Mississippi State Personnel Bd. v. Armstrong*, 454 So. 2d 912, 1984 Miss. LEXIS 1842 (Miss. 1984).

This section [Code 1942, § 1207] is superseded, as to appeals under the Public Utility Act of 1956, by Code 1942, § 7716-26. *Mississippi Valley Gas Co. v. Jackson*, 236 Miss. 81, 109 So. 2d 637, 1959 Miss. LEXIS 297 (Miss. 1959).

Evidence in the proceeding below cannot be examined on certiorari. *Mississippi Valley Gas Co. v. Jackson*, 236 Miss. 81, 109 So. 2d 637, 1959 Miss. LEXIS 297 (Miss. 1959).

Certiorari is an extraordinary writ and should not be employed where the legislature has provided a plain, speedy and adequate remedy by direct appeal with a reporter's transcript of the testimony. *Mississippi Valley Gas Co. v. Jackson*, 236 Miss. 81, 109 So. 2d 637, 1959 Miss. LEXIS 297 (Miss. 1959).

Statute (§ 4405, Code 1906) providing for a review of all proceedings of the board of supervisors in laying out, altering, or changing any public road and assessing damages therefor by an appeal to the circuit court, does not preclude the right to have such proceedings reviewed by certiorari as provided by this section [Code 1942, § 1207]. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596, 1927 Miss. LEXIS 208 (Miss. 1927).

2. Inferior tribunals.

Although the circuit court did not have the authority, under § 25-9-132, to hear the Department of Wildlife Conservation's (DWC) appeal of a final decision of the

Employee Appeals Board (EAB), limited judicial review via writ of certiorari was available to the DWC under § 11-51-93, since the EAB is a "tribunal inferior" within the meaning of § 11-51-95. *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586, 1990 Miss. LEXIS 789 (Miss. 1990).

Review by certiorari is confined to an examination of the questions of law arising and appearing on the face of the records and proceedings before the board of supervisors. *Stennis v. Board of Supervisors*, 232 Miss. 212, 98 So. 2d 636, 1957 Miss. LEXIS 462 (Miss. 1957).

Circuit court has power to review by certiorari decisions of the secretary of state on the sufficiency of initiative and referendum petitions. *Power v. Robertson*, 130 Miss. 188, 93 So. 769, 1922 Miss. LEXIS 196 (Miss. 1922).

A case may be removed from a board of supervisors to the circuit court on a writ of certiorari. *Board of Sup'rs v. Melton*, 123 Miss. 615, 86 So. 369, 1920 Miss. LEXIS 62 (Miss. 1920).

The railroad commission is an inferior tribunal within the meaning of this section [Code 1942, § 1207], whose judgment may be reviewed by certiorari. *Gulf & S. I. R. Co. v. Adams*, 85 Miss. 772, 88 Miss. 772, 38 So. 348, 1904 Miss. LEXIS 125 (Miss. 1904).

3. Issuance of certiorari in general.

In petition for certiorari to review order of supervisors, it is only where ground for reversal appears from the record that circuit court can grant hearing on merits. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Writ to review order of supervisors, ordering an election on the question of prohibiting the sale and distribution of beer and wine in the county, held improvidently issued where exhibits attached to the petition recited all necessary jurisdictional facts entitling board to act. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Writ of certiorari to review order of supervisors, although improperly issued because of failure to show good cause, held not void where judge had jurisdiction to issue it. *Hamilton v. Long*, 181 Miss. 627,

180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Where no timely appeal or certiorari was taken to review judgment of board of supervisors that election to exclude sale of beer and wine was legal, that electors had voted to exclude, and prohibiting sale thereof, validity of judgment could not be questioned in proceeding to prohibit prosecution for selling beer and wine. *Blount v. Kerley*, 180 Miss. 863, 178 So. 591, 1938 Miss. LEXIS 42 (Miss. 1938).

4. Matters appealable by certiorari.

Circuit court properly refused a defendant's request for certiorari review of his trial, in absentia, for refusing to give a breath test because Miss. Code Ann. § 11-51-93 provided for certiorari review only when a pure question of law was presented; defendant was citing to a document in an attempt to support his argument that the municipal court date was changed, but the document was not part of the municipal court record. *Lott v. City of Bay Springs*, 960 So. 2d 525, 2006 Miss. App. LEXIS 842 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 405 (Miss. 2007).

The circuit court properly denied a motion of the Civil Service Commission to quash a writ of certiorari where the Commission's quasi-judicial modification of a penalty imposed upon a fireman presented a question of law upon the construction to be given to § 21-31-23. *Banks v. Greenwood*, 404 So. 2d 1038, 1981 Miss. LEXIS 2241 (Miss. 1981), but see *Beasley v. City of Gulfport*, 724 So. 2d 883, 1998 Miss. LEXIS 611 (Miss. 1998).

Order of board of supervisors providing for election on abolition of beer and light wine held appealable by certiorari. *Mohundro v. Board of Sup'rs*, 174 Miss. 512, 165 So. 124, 1936 Miss. LEXIS 194 (Miss. 1936).

Inferior tribunals' administrative and legislative orders cannot be removed to and re-examined by circuit court on writ of certiorari. *Anderson v. Franklin County School Board*, 164 Miss. 646, 146 So. 134, 1933 Miss. LEXIS 262 (Miss. 1933).

Writ of certiorari will not lie to circuit court from school board's order eliminating territory from school district; such

order being legislative and judicial. *Anderson v. Franklin County School Board*, 164 Miss. 646, 146 So. 134, 1933 Miss. LEXIS 262 (Miss. 1933).

Writ of certiorari should not have been issued to county school board of education which organized consolidated school district; board's action being more legislative than judicial in character. *Board of Supervisors v. Stephenson*, 130 So. 684 (Miss. 1930), rev'd, 160 Miss. 372, 134 So. 142, 1931 Miss. LEXIS 182 (Miss. 1931).

Order of board of supervisors directing road to be laid out and condemning land, held "final judgment," reviewable by certiorari. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596, 1927 Miss. LEXIS 208 (Miss. 1927).

Certiorari will not lie to review order of railroad commission fixing intrastate freight rates under authority of law; determination of such rates being a legislative and not a judicial function. *Illinois C. R. Co. v. Mississippi R. Co.*, 143 Miss. 805, 109 So. 868, 1926 Miss. LEXIS 324 (Miss. 1926).

Certiorari lies to the circuit court to review assessments of board of railroad assessors and test the legality thereof. *Illinois C. R. Co. v. Miller*, 141 Miss. 223, 106 So. 636, 1926 Miss. LEXIS 436 (Miss. 1926).

Writ of certiorari will not lie to review order of railroad commission fixing telephone rates. *Cumberland Tel. & Tel. Co. v. State*, 135 Miss. 835, 100 So. 378, 1924 Miss. LEXIS 71 (Miss. 1924).

Order of another board or tribunal cannot be reviewed by the circuit court in a case removed to it from a board of supervisors, unless such order is the basis for a judgment rendered by the board of supervisors in a judicial proceeding. *Board of Sup'rs v. Melton*, 123 Miss. 615, 86 So. 369, 1920 Miss. LEXIS 62 (Miss. 1920).

Mere administrative orders of an inferior tribunal cannot be removed to and be re-examined by a circuit court on a writ of certiorari, but only such as are of a judicial, or quasi-judicial, nature. *Board of Sup'rs v. Melton*, 123 Miss. 615, 86 So. 369, 1920 Miss. LEXIS 62 (Miss. 1920).

5. Effect of certiorari.

Due to the absence of a statutory right of appeal and the hospitals lacked a full,

plain, complete, and adequate remedy at law, the chancery court had jurisdiction over the hospitals' appeals challenging the Division of Medicaid's recalculation of their Medicaid outpatient rates for fiscal year 2001. *Miss. Div. of Medicaid v. Alliance Health Ctr.*, 174 So. 3d 254, 2015 Miss. LEXIS 461 (Miss. 2015).

Availability of a petition for a writ of certiorari under Miss. Code Ann. § 11-51-95 (Rev. 2012) was not the equivalent of a statutory right of appeal where the plain language of Miss. Code Ann. § 11-51-93 (Rev. 2012) and case law made certiorari review discretionary, and thus, appellate review was not guaranteed. *Miss. Div. of Medicaid v. Alliance Health Ctr.*, 174 So. 3d 254, 2015 Miss. LEXIS 461 (Miss. 2015).

Upon the filing of the proper petition and bond, and the issuance and service of the writ of certiorari removing the proceedings wherein the board of supervisors made an order directing the laying out of a road and the condemnation of land to the circuit court for review, all proceedings therein by the board of supervisors were thereby superseded, and any attempted orders or proceedings thereafter taken were improperly made a part of the transcript of the record transmitted to the circuit court, and a motion to strike such orders and proceedings should have been sustained. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596, 1927 Miss. LEXIS 208 (Miss. 1927).

6. Matters for review.

Where the mayor and board of aldermen had by resolution adjudged that a property owner's proposed addition to a building did not violate the city's zoning ordinances, the trial court, on certiorari, erred in hearing testimony upon the issue. *Mayor & Board of Aldermen v. White*, 230 Miss. 698, 93 So. 2d 852, 1957 Miss. LEXIS 411 (Miss. 1957).

Certiorari is statutory remedy designed for purpose of bringing into review acts of inferior tribunal upon record made by such tribunal on questions of law, but upon hearing in reviewing court evidence may be heard to make manifest the error of law committed by inferior tribunal. *Caruthers v. Panola County*, 205 Miss.

403, 38 So. 2d 902, 1949 Miss. LEXIS 438 (Miss. 1949).

Petitioner for writ of certiorari to review proceedings of board of supervisors of county divided into two court districts has right to show that board has never adopted order for holding of regular meetings in second district on second Monday of each month and on failure to make such showing he cannot contend orders of board of supervisors are void because they fail to show lawful authority for holding meetings at which orders were adopted. *Caruthers v. Panola County*, 205 Miss. 403, 38 So. 2d 902, 1949 Miss. LEXIS 438 (Miss. 1949).

Where the circuit court petitioned to act by way of certiorari, after a decree in chancery court validating the issuance of county funding bonds, was confined to the same record, made by the board of supervisors, which the chancery court had before it in the validation proceedings, disposition of an appeal from the chancery court would not be stayed. *In re Validation of Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26, 1940 Miss. LEXIS 221 (Miss. 1940).

Statute held not to authorize examination of transcript of evidence on review of Railroad Commission's decision granting certificate of convenience and necessity. *Yazoo & M. V. R. Co. v. Mississippi R. Com.*, 169 Miss. 131, 152 So. 649, 1934 Miss. LEXIS 18 (Miss. 1934).

Under this section [Code 1942, § 1207], the court to which a case has been removed by a writ of certiorari is confined to the examination of questions of law arising or appearing on the face of the record and proceedings. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 489, 120 So. 173, 1929 Miss. LEXIS 2 (Miss. 1929); *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938); *In re Validation of Lincoln County Funding Bonds*, 187 Miss. 392, 193 So. 26, 1940 Miss. LEXIS 221 (Miss. 1940); *Viator v. State Tax Com.*, 193 Miss. 266, 5 So. 2d 487, 1942 Miss. LEXIS 78 (Miss.), cert. denied, 316 U.S. 643, 62 S. Ct. 1036, 86 L. Ed. 1728, 1942 U.S. LEXIS 732 (U.S. 1942).

District court could not look to evidence in case transferred from county court by

writ of certiorari. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114, 1929 Miss. LEXIS 34 (Miss. 1929).

Under writ of certiorari from circuit court to county court, return should not have included transcript of evidence. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 494, 121 So. 114, 1929 Miss. LEXIS 34 (Miss. 1929).

7. Proceedings on certiorari.

There was no error with an employee appealing the University of Mississippi Personnel Action Review Board's (PARB) decision upholding her dismissal because to follow the statute and a letter by the assistance human resource director, the employee would need to appeal to the chancellor within seven days of the PARB decision and to the circuit court within 180 days of the PARB decision, and that was exactly what she did. *Avery v. Univ. of Miss.*, — So. 3d —, 2019 Miss. App. LEXIS 194 (Miss. Ct. App. May 7, 2019).

If a case removed to the circuit court by a writ of certiorari is there tried anew on its merits, the procedure is the same as that in cases tried de novo in ordinary appeals to the circuit court. *Board of Sup'rs v. Melton*, 123 Miss. 615, 86 So. 369, 1920 Miss. LEXIS 62 (Miss. 1920).

8. —Pleading.

An appeal from a circuit court order reversing an order of the Employee Appeals Board, which granted a state service employee's motion to collaterally estop her employer—the Mississippi Department of Corrections (MDOC)—from relitigating factual issues decided in the employee's unemployment claim, would be dismissed for lack of jurisdiction since no appeal to the circuit court by an administrative agency is authorized by § 25-9-132, and the MDOC did not comply with the statutory requisites for certiorari pursuant to §§ 11-51-93 and 11-51-95 where the

MDOC filed only a brief in support of review and failed to file a petition supported by affidavit. *Bertucci v. Mississippi Dep't of Corrections*, 597 So. 2d 643, 1992 Miss. LEXIS 157 (Miss. 1992).

On petition for certiorari to review an order of a board of supervisors ordering an election on the question of prohibiting the sale and distribution of beer and wine in the county, the averment of exhibits attached to petition control. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Refusal to allow amendment of pleadings, whereby it was sought to have registration books and poll books, and other records, brought up to ascertain percentage of qualified electors signing petition for election, held not error. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

9. —Parties.

Signers of petitions to lay out or change road held not proper parties to certiorari for review of proceedings by board of supervisors pursuant thereto. *Ferguson v. Seward*, 146 Miss. 613, 111 So. 596, 1927 Miss. LEXIS 208 (Miss. 1927).

10. —Judgment.

After election had, pursuant to the order of the board of supervisors on the question of prohibiting the sale and distribution of beer and wine in the county, while certiorari proceedings were pending, court properly affirmed supervisors' order, in absence of error appearing on face of record. *Hamilton v. Long*, 181 Miss. 627, 180 So. 615, 1938 Miss. LEXIS 103 (Miss. 1938).

Supreme court, reversing circuit court judgment reversing county court judgment, cannot render summary judgment on appeal bond carrying case from county to circuit court. *Federal Credit Co. v. Zepernick Grocery Co.*, 153 Miss. 498, 121 So. 858, 1929 Miss. LEXIS 95 (Miss. 1929).

RESEARCH REFERENCES

ALR.

Existence of jurisdictional facts found by inferior tribunal as subject of inquiry

on certiorari. 5 A.L.R.2d 675.

Applicability of statute of limitations or doctrine of laches to certiorari. 40

A.L.R.2d 1381.

Am. Jur.

5A Am. Jur. Pl & Pr Forms (Rev), Cer-

tiorari, Forms 41 et seq. (judicial proceedings-for review of inferior court proceedings).

§ 11-51-97. New appeal bond.

In all appeals and in proceedings of certiorari to the circuit court, the said court, on motion of the appellee or obligee, may inquire into the sufficiency of the amount of the bond, and of the security thereon, and may at any time require a new bond, or additional security, on pain of dismissal; and if any bond be defective, the principal therein may give a new one, which shall have the same effect as if given originally.

HISTORY: Codes, Hutchinson's 1848, ch. 56, art. 16 (7); 1857, ch. 42, art. 20; 1871, § 1596; 1880, § 2658; 1892, § 91; 1906, § 92; Hemingway's 1917, § 74; 1930, § 74; 1942, § 1208.

Cross References — Authority of court or judge to require new security, see § 11-1-23.

Effect of insufficiency of appeal bond in Supreme Court, see § 11-3-33.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Amendment.
3. New or additional bond.

1. In general.

Since the sheriff, who had been convicted of contempt of court, had made no effort whatever to give an appeal bond, this section [Code 1942, § 1208] did not apply. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

Where a sheriff, who had been adjudged guilty of contempt of county court, made no effort to file an appeal bond, and, after the time for appeal had expired, the county judge directed the issuance of a *capias pro fine* to the coroner, who took the sheriff into custody, but the sheriff had presented to the judge of the circuit court of the county a petition for habeas corpus, which was made returnable before the county judge, the judge in the habeas corpus proceedings was without the authority to then permit the sheriff to execute bonds and thereby effectually appeal the contempt judgments to the circuit court of the county. *Watson v. Holifield*,

229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

Where appeal-bond for less than statutory amount was approved, appeal from justice court to county court was not void but only defective, and county court could enter nonsuit on appellant's motion. *Keys v. Borden*, 178 Miss. 173, 171 So. 887, 1937 Miss. LEXIS 174 (Miss. 1937).

Bank, which was depository of school funds, was not entitled to appeal without bond in action for mandamus to require payment of warrant on the funds. *Cleveland State Bank v. Cotton Exchange Bank*, 118 Miss. 768, 79 So. 810, 1918 Miss. LEXIS 104 (Miss. 1918).

The justice of the peace, on appeal to the circuit court, refusing to approve the appeal bond and send up the record, it may be brought up by certiorari. *Barrett v. Pickett*, 117 Miss. 825, 78 So. 777, 1918 Miss. LEXIS 227 (Miss. 1918).

2. Amendment.

Circuit court held authorized to permit amendment of \$100 appeal bond from unlawful entry and detainer court to meet statutory requirement for appeal bond of not less than \$200, or to permit execution of new bond. *Williams v. Johnson*, 175

Miss. 419, 167 So. 639, 1936 Miss. LEXIS 67 (Miss. 1936).

Where an appeal bond is defective in any respect, the circuit court should permit it to be amended. *Gaddis v. Palmer*, 60 Miss. 758, 1883 Miss. LEXIS 9 (Miss. 1883); *Leavenworth v. Crittenden*, 62 Miss. 573, 1885 Miss. LEXIS 111 (Miss. 1885); *James v. Woods*, 65 Miss. 528, 5 So. 106, 1888 Miss. LEXIS 38 (Miss. 1888).

Where a county has two judicial districts, a bond reciting an appeal to the circuit court of the wrong district may be amended by leave of the court of the proper district. *Nations v. Lovejoy*, 80 Miss. 401, 31 So. 811, 1902 Miss. LEXIS 259 (Miss. 1902).

A bond in a penalty less than the minimum sum required by law is not void but may be amended. *Denton v. Denton*, 77

Miss. 375, 27 So. 383, 1899 Miss. LEXIS 71 (Miss. 1899).

3. New or additional bond.

An appeal bond, defective because the penalty thereof was too small, was not a nullity and the appellant had the right to file a new bond. *Thorsen v. Illinois C. R. Co.*, 112 Miss. 139, 72 So. 879, 1916 Miss. LEXIS 76 (Miss. 1916).

An order requiring an additional appeal bond to be given within a limited time and providing that in default thereof the appeal be dismissed, being interlocutory, failure to give the bond within the time does not operate as a dismissal and the court retains jurisdiction until final judgment dismissing the appeal. *Nichols v. Kendrick*, 76 Miss. 334, 24 So. 534, 1898 Miss. LEXIS 90 (Miss. 1898).

RESEARCH REFERENCES

ALR.

Applicability of statute of limitations or doctrine of laches to certiorari. 40 A.L.R.2d 1381.

Am. Jur.

2 Am. Jur. Pl & Pr Forms (Rev), Appeal

and Error, Form 491.1 (notice – motion for order that security is insufficient).

CJS.

4 C.J.S., Appeal and Error §§ 445, 447, 448.

§ 11-51-99. How executors, administrators, guardians, and conservators appeal.

The chancery court, in its discretion, may allow executors, administrators, guardians and conservators to appeal money or property judgments or orders against their wards or estates with supersedeas under any existing bond or one set for that purpose; but they shall pay the costs of the lower court including the Supreme Court filing fee.

HISTORY: Codes, 1880, § 2334; 1892, § 92; 1906, § 93; *Hemingway's* 1917, § 75; 1930, § 75; 1942, § 1209; *Laws*, 1978, ch. 335, § 30; *Laws*, 2000, ch. 577, § 7, eff from and after July 1, 2000.

Cross References — Bond required of executor or administrator with the will annexed, see § 91-7-41.

Bond required of administrator, see § 91-7-67.

Bond required of guardian, see § 93-13-17.

JUDICIAL DECISIONS

1. In general.

An appellant could not claim § 11-51-99

as a basis for not having to file a supersedeas bond on an appeal of a case con-

cerning the distribution of an estate of which she had been the administratrix where she was no longer the administratrix of the estate. *Perkins v. Thompson*, 539 So. 2d 1029 (Miss. 1989).

Section 11-51-99 mandatorily requires supersedeas without bond for conservators appealing orders affecting the conservator in his or her fiduciary capacity, however, conservator is required to pay court costs and transcription costs. In re Conservatorship of Stallings, 523 So. 2d 49, 1988 Miss. LEXIS 69 (Miss. 1988).

In view of statute (§ 93-13-259) stating that conservators have same powers, rights and duties as guardians, statute (§ 11-51-99) governing appeals by guardians also governs appeals by conservators; accordingly, conservator appealing decree discharging conservator is entitled to do so with supersedeas without bond in accordance with § 11-51-99. Conservatorship of Harris v. King, 480 So. 2d 1131, 1985 Miss. LEXIS 2371 (Miss. 1985).

A decree that a devise had lapsed and that the property which was the subject of that devise became intestate property was an adjudication as to the rights of the litigants among themselves and was not an adjudication against the administratrix cum testamento annexo in her capacity as a fiduciary or representative, and she was not, therefore, entitled to appeal under this section [Code 1942, § 1209].

House v. Roberts, 254 So. 2d 904, 1971 Miss. LEXIS 1532 (Miss. 1971).

Where an administrator, appealing from a decree dismissing his bill of complaint, failed to file a written petition for the appeal with the clerk below or to file the record in the supreme court within the six months during which an appeal could be taken, appeal was barred by limitation before the record was filed, and should be dismissed upon motion. *Oswalt v. Austin*, 192 Miss. 653, 6 So. 2d 924, 1942 Miss. LEXIS 53 (Miss. 1942).

While a petition in writing for an appeal to the supreme court filed with the clerk of the trial court is one method of obtaining an appeal, such a petition is not necessary to the validity thereof; and where no appeal bond is given or required, the appeal is considered to have been taken when, but not until, the transcript of the record in the case is filed with the clerk of the supreme court. *Oswalt v. Austin*, 192 Miss. 653, 6 So. 2d 924, 1942 Miss. LEXIS 53 (Miss. 1942).

The section [Code 1942, § 1209] does not relieve an executor against whom a decree has been rendered to be satisfied de bonis propriis from giving bond. *Hudson v. Gray*, 58 Miss. 589, 1881 Miss. LEXIS 3 (Miss. 1881).

But the appeal may be without bond if by the executor in his fiduciary character only. *Hudson v. Gray*, 58 Miss. 589, 1881 Miss. LEXIS 3 (Miss. 1881).

RESEARCH REFERENCES

ALR.

Right of trustee or executor to appeal from decree or order of removal. 37 A.L.R.2d 751.

Right to allowance out of estate for attorneys' fees incurred on appeal in attempt to establish or defeat will. 40 A.L.R.2d 1407.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings. 41 A.L.R.2d 1324.

Right of executor or administrator to

appeal from order granting or denying distribution. 16 A.L.R.3d 1274.

Appealability of probate orders allowing or disallowing claims against estate. 84 A.L.R.4th 269.

CJS.

4 C.J.S., Appeal and Error § 443.

Law Reviews.

1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-51-101. State, county, and municipality, and officials representing them, may appeal without bond; prepayment of costs in lower court; costs of record of trial court.

(1) The state and any county or municipality of the state, and the officials representing the state, county or municipality, in any suit or action, and any state, county or municipal officer who is a party to any suit or action in his official character, in which suit or action the state, county or municipality is beneficially interested, and the several incorporated charitable or educational institutions established and maintained by the state, and all corporate instrumentalities wholly owned by the United States government, shall be entitled to appeal from a judgment, decree, decision or order of any court or judge from which an appeal may be taken without prepayment of costs in the lower court; however, the cost of the preparation of the record of the proceedings in the trial court shall be prepaid. In any such case, if a supersedeas is allowed and desired, a bond for supersedeas shall not be required.

(2) Any person who is a party to a suit or action in his individual capacity, which suit arises from allegedly tortious actions and deeds committed by him during the time he was a member, trustee, director, superintendent, official or employee, as the case may be, of the Department of Corrections, the State Penitentiary or the state psychiatric hospitals or institutions, and which allegedly tortious acts and deeds were committed by the person in the performance of his duties or employment, shall be entitled to appeal from a judgment, decree, decision or order of any court or judge from which an appeal may be taken without prepayment of costs in the lower court, including the costs of the preparation of the record of the proceedings in the trial court. In those cases, if a supersedeas is allowed and desired, a bond for supersedeas shall not be required. The provisions of this section shall not apply to any such judgment, decree, decision or order in favor of the State of Mississippi.

HISTORY: Codes, 1880, § 2333; 1892, § 93; 1906, § 94; Hemingway's 1917, § 76; 1930, § 76; 1942, § 1210; Laws, 1938, ch. 356; Laws, 1975, ch. 448; Laws, 1990, ch. 454, § 1; Laws, 2008, ch. 442, § 7, eff from and after July 1, 2008.

Cross References — Authority of state, county, or municipality to appeal from tax assessment without bond, see § 11-51-77.

Authority of state tax commission to appeal without bond, see § 27-3-33.

State of Mississippi's exemption from giving security to obtain a stay of judgment, see Miss. R. Civ. P. 62.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Particular applications.

1. In general.

Election commissioners are officials

within the meaning of § 11-51-101. *Fisher v. Crowe*, 289 So. 2d 921, 1974 Miss. LEXIS 1694 (Miss. 1974).

This section [Code 1942, § 1210] was intended to apply to all persons representing State in judicial proceedings under

delegated authority, and words “beneficially interested” are not limited to financial interest in particular suit, but include interest therein of State in governmental capacity. *Love v. Mississippi Cottonseed Products Co.*, 174 Miss. 697, 159 So. 96, 165 So. 446, 1935 Miss. LEXIS 28 (Miss. 1935).

Code 1892 § 79 (Code 1942, § 1195) allows appeals from board of supervisors to circuit court. Section 85 [Code 1942, § 1201] limits appeals from circuit court to cases where amount in controversy exceeds \$50 if originating in justices’ court. There is no such limitation on board of supervisors, and the board may appeal without bond. *Marshall County v. Rivers*, 88 Miss. 45, 40 So. 1007, 1906 Miss. LEXIS 153 (Miss. 1906).

2. Particular applications.

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it; the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and procedural rule from the requirement to file a supersedeas bond. *City of Belzoni v. Johnson*, 121 So. 3d 216, 2013 Miss. LEXIS 472 (Miss. 2013).

Mississippi Regional Housing Authority was entitled to a stay pending appeal and was not required to post a supersedeas bond under Fed. R. Civ. P. 62(f), Miss. R. Civ. P. 62(f), and Miss. Code Ann. § 11-51-101 because: (1) Miss. Code Ann. 43-33-11, which provided that an authority constituted a public body corporate and politic, that exercised public and essential governmental functions, and had all the powers necessary or convenient to carry out and effectuate its purposes, supported the conclusion that the housing authority was entitled to the exemptions; (2) the housing authority and its functions were “integral parts” of Mississippi government; and (3) the Mississippi Supreme Court recognized that a housing authority was a “governmental entity” in another context. *Urban Developers, Inc. v. City of Jackson*, 227 F.R.D. 464, 2005 U.S. Dist. LEXIS 5423 (S.D. Miss. 2005).

Municipal separate school district is agency exempted by § 11-51-101 from giving appeal bond; accordingly, cost of appeal bond posted by school board in appeal by board from decision of Chancery Court reversing board decision made under § 37-9-111 may not be assessed as court costs. *Board of Trustees v. Gates*, 467 So. 2d 216, 1985 Miss. LEXIS 1987 (Miss. 1985).

County board of education, and its president, as agents of the estate, may appeal without giving bond. *County Board of Education v. Smith*, 239 Miss. 53, 121 So. 2d 139, 1960 Miss. LEXIS 266 (Miss. 1960).

Since the sheriff, in his contemptuous acts, was not representing the county and it had no beneficial interest in his conviction or acquittal, the sheriff was not exempt by this section [Code 1942, § 1210] from executing a bond upon appealing from contempt judgments. *Watson v. Holifield*, 229 Miss. 27, 89 So. 2d 924, 1956 Miss. LEXIS 582 (Miss. 1956).

Action taken first by mayor in effecting appeal from judgment in mandamus proceedings requiring him to execute and deliver warrant on maintenance fund of municipal separate school district for payment of installment due under building contract for construction of a gymnasium and vocational building, and thereafter by a taxpayer entering into bond for costs and prosecuting the appeal from failure of the mayor to do so, constituted an appeal with supersedeas, especially where no appeal supersedeas was denied by the trial court. *Williams v. State*, 209 Miss. 251, 46 So. 2d 591, 1950 Miss. LEXIS 385 (Miss. 1950).

A drainage district is a separate, distinct legal entity, with power to sue and be sued as such in its corporate name, and is not excepted from the necessity of giving bond for appeal to the supreme court. *Sabougla Drainage Dist. v. People’s Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219, 2 So. 2d 573, 1941 Miss. LEXIS 109 (Miss. 1941).

Where an effort had been made in good faith by a drainage district to perfect an appeal within six months, and there had been no intentional delay in having the records filed with the clerk of the Supreme

Court, and only a short delay in filing it, with no damage or prejudice to the other party, the Supreme Court in its discretion overruled a motion to dismiss the appeal on the ground of inexcusable delay in filing the transcript in the Supreme Court, and granted the drainage district permission to file the proper appeal bond within ten days. *Sabougla Drainage Dist. v. People's Bank & Trust Co.*, 191 Miss. 331, 1 So. 2d 219, 2 So. 2d 573, 1941 Miss. LEXIS 109 (Miss. 1941).

In suit by superintendent of banks, in charge of liquidation of bank, for collection of debt allegedly due the bank, superintendent held entitled to appeal from adverse decree without bond. *Love v. Mississippi Cottonseed Products Co.*, 174 Miss. 697, 159 So. 96, 165 So. 446, 1935 Miss. LEXIS 28 (Miss. 1935).

Bank, which was depository of school funds, was not entitled to appeal without bond in action for mandamus to require payment of warrant on the funds. *Cleveland State Bank v. Cotton Exchange Bank*, 118 Miss. 768, 79 So. 810, 1918 Miss. LEXIS 104 (Miss. 1918).

A county may appeal from a decree overruling its demurrer to a bill in equity under Code 1892 § 33 (Code 1906, § 34), without giving bond. *Jones v. Rogers*, 85 Miss. 578, 38 So. 310 (Miss. 1904).

A petition for a mandamus in behalf of the state to compel the board of supervisors of a county to hold a special election to locate the county site having been denied, the state can appeal without bond. *State ex rel. Attorney Gen. v. Board of Sup'rs*, 64 Miss. 358, 1 So. 501, 1886 Miss. LEXIS 73 (Miss. 1886).

RESEARCH REFERENCES

ALR.

Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 A.L.R.4th 1130.

Hospital's liability for mentally damaged patient's self-inflicted injuries. 36 A.L.R.4th 117.

Validity and construction of statute or ordinance limiting the kinds or amount of actual damages recoverable in tort action

against governmental unit. 43 A.L.R.4th 19.

Payment of attorneys' services in defending action brought against officials individually as within power or obligation of public body. 47 A.L.R.5th 553.

CJS.

4 C.J.S., Appeal and Error §§ 444.

§ 11-51-103. Written demand for appeal in certain cases.

In all cases where an appeal is desired without bond, from a judgment of a justice of the peace, and in cases of unlawful entry and detainer, by parties who are not required to give bond therefor, a written demand for the appeal shall be filed, in lieu of the bond required of others, within the time allowed for appeal in such cases.

HISTORY: Codes, 1892, § 94; 1906, § 95; Hemingway's 1917, § 77; 1930, § 77; 1942, § 1211.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Unlawful entry and detainer actions generally, see §§ 11-25-1 et seq.

Appeal from unlawful entry and detainer court, see § 11-51-83.

Criminal appeal without bond, see § 99-35-7.

JUDICIAL DECISIONS

1. In general.

Neither this section [Code 1942, § 1211] (§ 95, Code 1906) nor § 83, Code 1906 (Code 1942, § 1198) has any appli-

cation to an appeal provided for by § 80 (Code 1942, § 1195). *Polk v. Hattiesburg*, 110 Miss. 80, 69 So. 1005, 1915 Miss. LEXIS 19 (Miss. 1915).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review, §§ 292, 294, 340- 342.

CJS.

4 C.J.S., Appeal and Error §§ 432-456.

§§ 11-51-105 through 11-51-109. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-51-105. [Codes, Hemingway's 1921 Supp. § 211a; 1930, § 78; 1942, § 1212; Laws 1920, ch. 220; Am Laws, 1978, ch. 335, § 31]

§ 11-51-107. [Codes, Hemingway's 1921 Supp. § 211b; 1930, § 79; 1942, § 1213; Laws, 1920, ch. 220; Am Laws, 1978, ch. 335, § 32]

§ 11-51-109. [Codes, Hemingway's 1921 Supp. § 211c; 1930, § 80; 1942, § 1214; Laws, 1920, ch. 220; Am Laws, 1978, ch. 335, § 33]

Editor's Notes — Former § 11-51-105 related to taxpayer liable for costs only – no petition for appeal required.

Former § 11-51-107 related to taxpayer liable for costs only – no petition for appeal by taxpayers.

Former § 11-51-109 related to notice to court reporter and other officers in appeal by taxpayers.

§ 11-51-111. Taking of appeal from courts of separate judicial districts in Harrison County.

In Harrison County, a county having two judicial districts, all appeals, writs of error or other like remedies may be taken and prosecuted from the circuit, chancery and county courts of either of said districts to the Supreme Court, in the same manner and to the same extent and on the same terms as appeals, writs of error and other like remedies are authorized to be taken from the circuit, chancery and county courts holden in the different counties of the state.

HISTORY: Codes, 1942, § 2910-11; Laws, 1962, ch. 257, § 11, eff from and after passage (approved June 1, 1962).

§ 11-51-113. Repealed.

Repealed by Laws of 1978, ch. 335, § 41, eff from and after July 1, 1978. [En Laws 1973, ch. 345, § 1]

Editor's Notes — Former § 11-51-113 related to cash deposits in lieu of posting a penal bond.

CHAPTER 53.

COSTS

Sec.

- 11-53-1 and 11-53-3. Repealed.
- 11-53-5. How security given.
- 11-53-7. Security for costs before justice of the peace.
- 11-53-9. Costs paid from deposit.
- 11-53-11. Official bond covers deposit.
- 11-53-13. Security for costs shall not be required in certain suits.
- 11-53-15. Usee liable for costs—state as nominal plaintiff.
- 11-53-17. Poor persons may sue without security for costs.
- 11-53-19. Court may dismiss action of poor persons.
- 11-53-21. Judgment for costs against poor persons.
- 11-53-23. Costs on dismissal for want of jurisdiction.
- 11-53-25. Stale cases dismissed at cost of plaintiff.
- 11-53-27 and 11-53-29. Repealed.
- 11-53-31. Successful party liable for certain costs.
- 11-53-33. Costs not recovered in some cases — limited in others.
- 11-53-35. Repealed.
- 11-53-37. Costs in class suits.
- 11-53-39. Repealed.
- 11-53-41. Executors and administrators entitled to and liable for costs — when not individually liable.
- 11-53-43. Executors and administrators entitled to and liable for costs — in their administration.
- 11-53-45. Next friend of infant liable for costs.
- 11-53-47. Repealed.
- 11-53-49. Costs in cases of setoff.
- 11-53-51. Costs in cases of appeal from justices of the peace.
- 11-53-53. Costs in cases of certiorari and appeals from certain inferior tribunals.
- 11-53-55. Cases not expressly embraced by statute or Rule.
- 11-53-57. Repealed.
- 11-53-59 and 11-53-61. Repealed.
- 11-53-63. Repealed.
- 11-53-65. Bill of costs made and filed.
- 11-53-67. Fees not payable until bill produced.
- 11-53-69. Costs not due until suit ended.
- 11-53-71. Taxation of costs in cases from justices of the peace.
- 11-53-73. Execution for costs.
- 11-53-75. Bill of costs appended to execution.
- 11-53-77. Combining orders and decrees to save costs.
- 11-53-79. Table of fees to be posted conspicuously.
- 11-53-81. Recovery of attorney's fees in suit on open account.

§§ 11-53-1 and 11-53-3. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-53-1. [Codes, Hutchinson's 1848, ch. 58, art. 1 (71); 1857, ch. 61, art. 54; 1871, § 571; 1880, § 2359; 1892, § 861; 1906, § 939; Hemingway's 1917, § 648; 1930, § 655; 1942, § 1566]

§ 11-53-3. [Codes, Hutchinson's 1848, ch. 58, art. 5 (6); 1857, ch. 61, art.

55; 1871, § 572; 1880, § 2360; 1892, § 862; 1906, § 940; Hemingway's 1917, § 649; 1930, § 656; 1942, § 1567]

Editor's Notes — Former § 11-53-1 related to security for costs before suit commenced.

Former § 11-53-3 related to security for costs after suit commenced.

§ 11-53-5. How security given.

Security for costs may be given by recognizance entered into in open court, or by written undertaking indorsed on or filed with the papers in the cause, or by a deposit with the clerk of the court of the amount in cash or a certified check on any solvent bank in this state. The judgment, when rendered against the plaintiff or complainant, shall be rendered against the surety as well as against the plaintiff or complainant; and execution may be issued as in other cases for all costs for which the plaintiff or complainant may be liable in the cause. Additional security may be required by the court or the justice of the peace, if it appear that the security already taken is insufficient.

HISTORY: Codes, 1857, ch. 61, art. 56; 1871, § 573; 1880, § 2361; 1892, § 863; 1906, § 941; Hemingway's 1917, § 650; 1930, § 657; 1942, § 1568.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appeal bonds where no supersedeas is granted, see § 11-51-29.

Liability of clerk or justice of the peace on his official bond for money deposited for costs, see § 11-53-11.

Provision for additional cost to create court education and training fund, see §§ 37-26-1 et seq.

Appeal bonds in criminal cases, see § 99-35-105.

Deposit in lieu of bond in criminal cases, see § 99-35-107.

Requiring additional costs associated with the commencement of an action, see Miss. R. Civ. P. 3.

JUDICIAL DECISIONS

1. In general.

Court, where parties during term tender deposit of money for costs, should set aside order of dismissal because of failure to give security. *Meeks v. Meeks*, 156 Miss. 638, 126 So. 189, 1930 Miss. LEXIS 185 (Miss. 1930).

On reversal of decree for complainant, his bond, given under this section [Code 1942, § 1568], is liable for costs below and on appeal, and decree is against principal and surety. *Victory Sparkler & Specialty Co. v. Price*, 146 Miss. 192, 111 So. 437, 1927 Miss. LEXIS 185 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 82, 83.

Complaint, petition, or declaration – On undertaking for costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 121.

Filing of bond for costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 21-27.

CJS.

20 C.J.S., Costs §§ 77 et seq., 80 et seq.

§ 11-53-7. Security for costs before justice of the peace.

The foregoing provisions as to securing or paying costs before suit brought, and requiring security for costs after suit commenced, and as to rendering judgment against the plaintiff and surety, shall apply to justices of the peace, and the courts held by them as such, or in proceedings in unlawful entry and detainer, or in any other proceeding; but in those courts the security, when required after the commencement of a suit, shall be given within ten days after the order of the court made for that purpose.

HISTORY: Codes, 1880, § 2362; 1892, § 864; 1906, § 942; Hemingway's 1917, § 651; 1930, § 658; 1942, § 1569.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 74 et seq.

7A Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 31 et seq. (filing of bond for costs).

7A Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 41 et seq. (dismissal for failure to give security).

Proceedings to require plaintiff to give security, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 1-14.

Filing of bond for costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 21-27.

Dismissal for failure to give security, 7 Am. Jur. Pl & Pr Forms (Rev ed), Costs, Forms 31-38.

CJS.

20 C.J.S., Costs §§ 61, 62 et seq., 68 et seq., 80 et seq., 189-192 et seq.

§ 11-53-9. Costs paid from deposit.

In case of a deposit of money or certified check for costs, if the costs be adjudged against the party making the deposit, the clerk or justice shall pay the costs out of the deposit, and the residue to the party entitled thereto. If the party making the deposit be not liable for costs, the whole of the deposit shall be returned to him.

HISTORY: Codes, 1880, § 2364; 1892, § 866; 1906, § 943; Hemingway's 1917, § 652; 1930, § 659; 1942, § 1570.

Cross References — Provision that clerk shall pay the costs on appeal out of money deposited for that purpose, see § 11-51-69.

Unused cost deposits being promptly returned to the parties on a case-by-case basis, see Miss. Rule Civil Proc. 3.

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 74 et seq.

CJS.

20 C.J.S., Costs § 78.

§ 11-53-11. Official bond covers deposit.

The clerk or justice of the peace shall be liable on his official bond to all persons having any claim to or interest in any money so deposited for costs; and for failure to pay over the same, as required, to the person entitled to it, shall, besides any other penalty provided, be liable to be dealt with for contempt by the court in which the deposit was made. A deposit in the hands of a clerk or justice at the expiration of his term of office shall be delivered to his successor.

HISTORY: Codes, 1880, § 2365; 1892, § 867; 1906, § 944; Hemingway's 1917, § 653; 1930, § 660; 1942, § 1571.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

JUDICIAL DECISIONS

1. **In general.** Allegations held to state a cause of action on clerk's bond. *United States Fidelity & Guaranty Co. v. Young*, 128 Miss. 296, 91 So. 3, 1922 Miss. LEXIS 116 (Miss. 1922).

RESEARCH REFERENCES

Am. Jur.
15A Am. Jur. 2d (Rev), Clerks of Court
§§ 56, 57, 61-65.

§ 11-53-13. Security for costs shall not be required in certain suits.

Neither the state, nor any county, city, town, or village, nor any state board, nor any state, county, city, town, or village officer, suing in his official character, shall be required to pay costs before commencing a suit, nor to give security for costs before or after the commencement of a suit.

HISTORY: Codes, 1880, § 2366; 1892, § 868; 1906, § 945; Hemingway's 1917, § 654; 1930, § 661; 1942, § 1572.

JUDICIAL DECISIONS

1. **In general.** This section [Code 1942, § 1572] merely relieves against the necessity of securing costs before bringing suit, but not against liability for costs of an unsuccessful suit. *State Board of Registration v. Rogers*, 239 Miss. 35, 121 So. 2d 720, 1960 Miss. LEXIS 498 (Miss. 1960).

OPINIONS OF THE ATTORNEY GENERAL

The fees of the constable must be paid if the process is served, therefore if the costs are not collected from the defendant, the county must pay them to the constable. Franklin, Nov. 1991, A.G. Op. #91-0803. Under Section 11-53-13, a county-

owned hospital filing suit in justice court is not required to pre-pay court costs. If it is unsuccessful in its case, it shall become immediately liable to pay the costs of the case. Thornton, December 6, 1995, A.G. Op. #95-0775.

Section 11-53-13 does not relieve the state of the duty of payment of court costs assessed against it by the court at the conclusion of the case. McCarty, December 7, 1995, A.G. Op. #95-0798.

Where a constable serves process in an action to collect a delinquent bill that is filed by the county, the constable is entitled to have his fee paid by the county if the defendant is unable to pay a judgment rendered against him. Massey, June 5, 1998, A.G. Op. #98-0322

A constable is not entitled to receive a

fee for service of process unless that process is actually served; if the constable returns the process "unable to serve" or "not found," then he has not actually served the process and he is not entitled to a fee. Fortier, October 9, 1998, A.G. Op. #98-0599

This section does not require the District Attorney, acting in his or her official capacity, to pre-pay fees in the Chancery or Circuit Courts; however, the Chancery Clerk may be entitled to fees upon adjudication and assessment of costs by the court. Jones, July 30, 1999, A.G. Op. #99-0369.

An entity of government is not required to prepay court costs prior to commencing a civil action. Erby, Apr. 29, 2005, A.G. Op. 05-0118.

RESEARCH REFERENCES

ALR.

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 A.L.R.2d 1379.

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 32- 37.

CJS.

20 C.J.S., Costs §§ 63, 65.

§ 11-53-15. Usee liable for costs—state as nominal plaintiff.

In suits in the name of the state or any person for the use of another, the usee may be required to secure or pay the costs, and shall be liable therefor; and in no case shall the state, as a nominal plaintiff, be liable for costs.

HISTORY: Codes, Hutchinson's 1848, ch. 58, art. 1 (23); 1857, ch. 61, art. 57; 1880, § 2367; 1892, § 869; 1906, § 946; Hemingway's 1917, § 655; 1930, § 662; 1942, § 1573.

Cross References — Liability for costs where information in quo warranto case is upon relation of private individual, see § 11-39-23.

Handling of costs in quo warranto case by judge before order for trial in vacation or afterward is made, see § 11-39-61.

RESEARCH REFERENCES

ALR.

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 A.L.R.2d 1379.

Am. Jur.

20 Am. Jur. 2d (Rev), Costs § 21, 27.

CJS.

20 C.J.S., Costs §§ 4, 5.

§ 11-53-17. Poor persons may sue without security for costs.

A citizen may commence any civil action, or answer a rule for security for costs in any court without being required to prepay fees or give security for costs, before or after commencing suit, by taking and subscribing the following affidavit:

"I, _____, do solemnly swear that I am a citizen of the State of Mississippi, and because of my poverty I am not able to pay the costs or give security for the same in the civil action (describing it) which I am about to commence (or which I have begun, as the case may be) and that, to the best of my belief, I am entitled to the redress which I seek by such suit."

HISTORY: Codes, 1880, §§ 2368, 2369; 1892, § 870; 1906, § 947; Hemingway's 1917, § 656; 1930, § 663; 1942, § 1574; Laws, 1936, ch. 251; Laws, 1991, ch. 573, § 87, eff from and after July 1, 1991.

Cross References — Appeals in criminal cases by one unable to give an appeal-bond or to deposit money to cover costs, see §§ 99-35-7, 99-35-105.

Provision that cost deposit, which ordinarily must accompany complaint, may be waived for paupers, see Miss. R. Civ. P. 3.

JUDICIAL DECISIONS

1. In general.

In a premises liability case, plaintiff was not entitled to proceed in forma pauperis on appeal, as any right to proceed in forma pauperis in a civil case existed only at the trial level. *Davis v. Office Max*, 131 So. 3d 588, 2013 Miss. App. LEXIS 428 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 97 (Miss. 2014).

In proceedings on remand for a new trial, a litigant may seek and obtain in forma pauperis status because the new trial proceeds de novo, or as if the case is being tried for the first time. *Blake v. Estate of Clein*, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

Miss. Code Ann. § 11-53-17 authorized in forma pauperis proceedings in civil cases at the trial level only; therefore, the inmate should not have been allowed to appeal his claims under the Mississippi Tort Claims Act in forma pauperis. *Bes- sent v. Clark*, 974 So. 2d 928, 2007 Miss. App. LEXIS 633 (Miss. Ct. App. 2007).

The right to proceed in forma pauperis applies only at the trial court level; appellate court cautioned trial courts against allowing appeals in forma pauperis unless required by law. *Slaydon v. Hansford*, 830 So. 2d 686, 2002 Miss. App. LEXIS 477

(Miss. Ct. App. 2002), overruled, *Blake v. Estate of Clein*, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

Mississippi's post-deprivation remedies for civil in forma pauperis litigants (§ 11-53-17) satisfied the Due Process Clause, notwithstanding the rule requiring civil litigants to prepay appellate costs, since the state provided a procedure, not conditioned on the payment of any fee, through which an indigent litigant would be able to seek redress at the trial court level. *Nickens v. Melton*, 38 F.3d 183, 1994 U.S. App. LEXIS 30971 (5th Cir. Miss. 1994), cert. denied, 514 U.S. 1025, 115 S. Ct. 1376, 131 L. Ed. 2d 230, 1995 U.S. LEXIS 2136 (U.S. 1995).

The Mississippi rule requiring civil litigants to prepay appellate costs did not violate the Equal Protection Clause with respect to litigants suing in forma pauperis (IFP) since IFP litigants are not a suspect class, and the rule requiring prepayment of costs for a civil appeal was rationally related to the state's legitimate interest in offsetting expenses associated with operating its appellate court system. *Nickens v. Melton*, 38 F.3d 183, 1994 U.S. App. LEXIS 30971 (5th Cir. Miss. 1994), cert. denied, 514 U.S. 1025, 115 S. Ct.

1376, 131 L. Ed. 2d 230, 1995 U.S. LEXIS 2136 (U.S. 1995).

Where an action is brought pursuant to § 11-53-17 and the court conducts a hearing on the issue of poverty to determine whether the action should be dismissed pursuant to § 11-53-19, it is entirely reasonable and in the interest of judicial economy that the pleading also be examined and the affiant questioned to determine whether the action is frivolous and, therefore, subject to dismissal pursuant to Rule 11, Miss. R. Civ. P. *Blanks v. State*, 594 So. 2d 25, 1992 Miss. LEXIS 44 (Miss. 1992).

While § 11-53-17 provides that persons who are truly indigent may proceed in civil actions as paupers, the statute authorizes in forma pauperis proceedings in civil cases at the trial level only. *Nelson v. Bank of Mississippi*, 498 So. 2d 365, 1986 Miss. LEXIS 2754 (Miss. 1986).

Statute permitting suit in forma pauperis applies only to a court of original jurisdiction and not to courts of appeal so as to permit setting down of a mandate on an affidavit in forma pauperis. *Life &*

Casualty Ins. Co. v. Walters, 190 Miss. 761, 198 So. 746, 200 So. 732, 1940 Miss. LEXIS 183 (Miss. 1940).

Delay for almost a year after granting of rule for security for costs did not justify court in striking affidavit of poverty and dismissing cause, in absence of showing that defendant was prejudiced by delay. *Bond v. Hattiesburg American*, 178 Miss. 122, 172 So. 509, 1937 Miss. LEXIS 193 (Miss. 1937).

All persons satisfying court of inability to secure costs are entitled to maintain suit, though not able to give bond or deposit money. *Meeks v. Meeks*, 156 Miss. 638, 126 So. 189, 1930 Miss. LEXIS 185 (Miss. 1930).

Evidence held insufficient to warrant holding plaintiff pauper's affidavit was not true. *Carroll v. Louisville & N. R. Co.*, 154 Miss. 188, 122 So. 469, 1929 Miss. LEXIS 129 (Miss. 1929).

A litigant who has sued in forma pauperis in a justice's court cannot appeal from an adverse judgment without bond. *Woods v. Davidson*, 57 Miss. 206, 1879 Miss. LEXIS 44 (Miss. 1879).

OPINIONS OF THE ATTORNEY GENERAL

This statute allows a citizen to commence "any civil action," which includes an action to enforce the Public Records Act in chancery court. *Peacock*, March 31, 1999, A.G. Op. #99-0109.

In a civil action where the plaintiff was allowed to proceed as an indigent, in the event the court declines to hold a hearing to inquire into the affidavit of poverty or if

the court holds a hearing and does not dismiss the complaint, the sheriff is required to deliver the summons and complaint in accordance with Rule 4 of the Mississippi Rules of Civil Procedure, and the county would bear the cost of the sheriff's fee. *McCormick*, May 27, 2005, A.G. Op. 05-0234.

RESEARCH REFERENCES

ALR.

Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant. 11 A.L.R.2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis. 98 A.L.R.2d 292.

Am. Jur.

Order – Ex parte – Granting leave to

sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 60.

Affidavit in support of motion for leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 55, 56.

Order – Denying leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 61.

CJS.

20 C.J.S., Costs §§ 90, 91, 99, 101 et seq.

§ 11-53-19. Court may dismiss action of poor persons.

The court may dismiss an action commenced or continued on affidavit of poverty, if satisfied that the allegation of poverty was untrue.

HISTORY: Codes, 1880, § 2370; 1892, § 871; 1906, § 948; Hemingway's 1917, § 657; 1930, § 664; 1942, § 1575.

Cross References — Indigent being examined as to his financial condition, and a court dismissing the action if the claim of indigency is false, see Miss R. Civ. P. 3.

JUDICIAL DECISIONS

1. In general.

Evidence was sufficient to support a trial court's determination that a patient's estate's claim of poverty was true and, therefore, the action, which was on remand for a new trial, was not subject to dismissal. *Blake v. Estate of Clein*, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

Where an action is brought pursuant to § 11-53-17 and the court conducts a hearing on the issue of poverty to determine whether the action should be dismissed pursuant to § 11-53-19, it is entirely reasonable and in the interest of judicial economy that the pleading also be examined and the affiant questioned to deter-

mine whether the action is frivolous and, therefore, subject to dismissal pursuant to Rule 11, Miss. R. Civ. P. *Blanks v. State*, 594 So. 2d 25, 1992 Miss. LEXIS 44 (Miss. 1992).

Evidence held insufficient to warrant holding plaintiff's pauper's affidavit was not true. *Carroll v. Louisville & N. R. Co.*, 154 Miss. 188, 122 So. 469, 1929 Miss. LEXIS 129 (Miss. 1929).

If the court is satisfied that allegation of poverty is untruthful, dismissal must be based on testimony taken and preserved the same as other testimony. *Feazell v. Soltzfus*, 98 Miss. 886, 54 So. 444 (Miss. 1910).

RESEARCH REFERENCES

Am. Jur.

24 Am. Jur. 2d, Dismissal, Discontinuance and Nonsuit § 51.

Order — Vacating order granting leave to sue in forma pauperis, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Form 73.

CJS.

20 C.J.S., Costs §§ 99, 100.

§ 11-53-21. Judgment for costs against poor persons.

In cases commenced or continued on an affidavit of poverty, the officers of the court shall perform all the duties required in the prosecution of the suit, and the witnesses shall attend until released; but in the case of failure to prosecute his suit to effect, judgment shall be given against the plaintiff for costs, and execution may be issued as in other cases.

HISTORY: Codes, 1880, § 2371; 1892, § 872; 1906, § 949; Hemingway's 1917, § 658; 1930, § 665; 1942, § 1576.

Cross References — Rule governing the awarding of costs to litigants, see Miss. R. Civ. P. 54.

§ 11-53-23. Costs on dismissal for want of jurisdiction.

When a case shall be dismissed by any court for want of jurisdiction, judgment shall be rendered by such court for costs against the party who invoked the jurisdiction, as in other cases.

HISTORY: Codes, 1880, § 2372; 1892, § 873; 1906, § 950; Hemingway's 1917, § 659; 1930, § 666; 1942, § 1577.

Cross References — Rule with respect to payment of cost of previously dismissed action, see Miss. R. Civ. P. 41.

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs § 23.

CJS.

20 C.J.S., Costs §§ 33, 35.

§ 11-53-25. Stale cases dismissed at cost of plaintiff.

The clerk of any court shall move the court to dismiss any cause pending therein in which no step has been taken for the two terms preceding; and the court shall, unless good cause be shown to the contrary, dismiss the same at the costs of the plaintiff or complainant.

HISTORY: Codes, 1857, ch. 61, art. 58; 1871, § 575; 1880, § 2373; 1892, § 874; 1906, § 951; Hemingway's 1917, § 660; 1930, § 667; 1942, § 1578.

Cross References — Requirement of notice before the dismissal of any case in which no action has been taken during the preceding twelve months, see Miss. R. Civ. P. 41.

JUDICIAL DECISIONS

ANALYSIS

1. Construction and application, generally.
2. Presumptions.
3. Dismissal.
4. Reinstatement.
5. Miscellaneous.

1. Construction and application, generally.

Statute of limitations applicable to action founded on judgment or decree (§ 15-1-43) is tolled when suit to renew decree is filed, but commences to run again when suit to renew is dismissed as stale under § 11-53-25; dismissal of stale case is not dismissal for matter of form to which statute of limitations applicable to commencement of new action subsequent to abatement or defeat of original action

(§ 15-1-69) would apply. *Deposit Guaranty Nat'l Bank v. Roberts*, 483 So. 2d 348, 1986 Miss. LEXIS 2396 (Miss. 1986).

This section [Code 1942, § 1578] manifests a legislative policy which renders improper the granting of leave to amend an inadequate complaint after fifteen years, though the action was never dismissed by the clerk or the court because never in the chancery clerk's files. *Osborne v. Vince*, 240 Miss. 807, 129 So. 2d 345, 1961 Miss. LEXIS 514 (Miss. 1961).

While this section [Code 1942, § 1578] does not provide for notice to be given of the clerk's motion to dismiss, evidently because of the fact that the interested parties are presumed to be before the court in cases pending on the active docket and are cognizant of what action is being taken or is proposed to be taken in their cases, and are, therefore, afforded

opportunity to show "good cause" to the contrary, it was never contemplated by this section that the parties to a suit which has been passed to the files until the further order of the court should be required to remain in attendance from day to day and from term to term pending such further order in order to show cause why the case should not be finally disposed of in the proposed manner, if and when it is withdrawn from the file, whether the proceedings be civil or criminal. *Ross v. Milner*, 194 Miss. 497, 12 So. 2d 917, 1943 Miss. LEXIS 84 (Miss. 1943).

This section [Code 1942, § 1578] is applicable only to cases not yet decided, and hence was inapplicable where judgment below had been reversed on appeal, although under court rule no mandate had been issued because of appellee's failure to pay costs. *Dubois v. Thomas*, 173 Miss. 697, 161 So. 868, 1935 Miss. LEXIS 239 (Miss. 1935).

This section [Code 1942, § 1578] is mandatory. *Mississippi C. R. Co. v. Brookhaven Lumber & Mfg. Co.*, 165 Miss. 820, 147 So. 814, 1933 Miss. LEXIS 315 (Miss. 1933).

2. Presumptions.

Action not tried for more than three years after institution, presumed continued from term to term by consent. *McCain v. Wade*, 181 Miss. 664, 180 So. 748, 1938 Miss. LEXIS 106 (Miss. 1938).

Order of dismissal in county court was presumed to be correct where there was nothing in record to show that it was absolutely void, since there is a general presumption in favor of correctness of judgments and presumption would obtain that dismissal was had because case was stale, in which event no notice was required. *Baker v. Moore*, 176 Miss. 431, 169 So. 773, 1936 Miss. LEXIS 148 (Miss. 1936).

3. Dismissal.

Statute of limitations applicable to action founded on judgment or decree (§ 15-1-43) is tolled when suit to renew decree is filed, but commences to run again when suit to renew is dismissed as stale under § 11-53-25; dismissal of stale case is not dismissal for matter of form to which

statute of limitations applicable to commencement of new action subsequent to abatement or defeat of original action (§ 15-1-69) would apply. *Deposit Guaranty Nat'l Bank v. Roberts*, 483 So. 2d 348, 1986 Miss. LEXIS 2396 (Miss. 1986).

In an action by a savings and loan association against a former vice-president of the association and members of the board of directors for \$26 million dollars in damages based on alleged breach of fiduciary duty in the management of the association, the trial court erred in granting the defendants' motion to dismiss the action as stale where the case was complex, involving an enormous mass of documentary material, and required a tremendous amount of work and time to comply with discovery, where the attorney for the savings and loan association had been killed in an airplane crash following four years of discovery proceedings and the association had made diligent efforts to retain substitute counsel, and where the defendants had made no effort to show prejudice which may have been sustained over the period of time prior to the dismissal. *Liberty Sav. & Loan Asso. v. Mitchell*, 398 So. 2d 208, 1981 Miss. LEXIS 2003 (Miss. 1981).

Where the order sustaining the defendant's demurrer and granting the complainant 30 days in which to amend his bill was entered in 1964, and when no amendment was filed the solicitor for the complainant, and defendant at several calls of the docket requested the chancery clerk to move to dismiss the suit as a stale case in compliance with Code 1942, § 1578, but no motion was made by the clerk and defendants did not file a motion to dismiss until 1967 when an attorney other than the attorney who had filed the original bill appeared and filed a motion asking for additional time in which to plead, the trial court did not err in refusing to dismiss the suit. *Helton v. Evans*, 208 So. 2d 778, 1968 Miss. LEXIS 1429 (Miss. 1968).

Where the heirs of a grantor brought an action to set aside a deed on the ground of mental incapacity of grantor, and such action was passed to the files pending the determination of a will contest predicated on grantor's want of testamentary capac-

ity, and more than two years after the adjudication of the will contest in complainants' favor, such suit was reinstated on the active docket by an heir of grantee and dismissed on motion, this section [Code 1942, § 1578] did not apply to permit dismissal of the action as a stale case where the heirs of grantor were not informed of the reinstatement of the action. *Ross v. Milner*, 194 Miss. 497, 12 So. 2d 917, 1943 Miss. LEXIS 84 (Miss. 1943).

Where cause was dismissed as stale on clerk's motion, court properly refused, under facts shown, to set aside order of dismissal. *Mississippi C. R. Co. v. Brookhaven Lumber & Mfg. Co.*, 165 Miss. 820, 147 So. 814, 1933 Miss. LEXIS 315 (Miss. 1933).

4. Reinstatement.

Case which has been dismissed as stale

cannot be reinstated after expiration of term of court within which dismissal is entered unless dismissal is defective, or involves fraud, mistake or accident. *Deposit Guaranty Nat'l Bank v. Roberts*, 483 So. 2d 348, 1986 Miss. LEXIS 2396 (Miss. 1986).

A case dismissed as stale by a trial court may be reinstated during the same term of court without notice to the adverse party. *Mississippi Rice Growers Asso. v. Pigott*, 191 So. 2d 399, 1966 Miss. LEXIS 1210 (Miss. 1966).

5. Miscellaneous.

Circuit court properly refused to entertain petition to transfer case which had been dismissed in county court by order from which no appeal had been taken. *Baker v. Moore*, 176 Miss. 431, 169 So. 773, 1936 Miss. LEXIS 148 (Miss. 1936).

OPINIONS OF THE ATTORNEY GENERAL

Under Section 11-53-25 a county should have two months following date of judgment before it would be required to pay

the accrued costs in justice court. *Thorn-ton*, December 6, 1995, A.G. Op. #95-0775.

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 22, 87, 93

CJS.

20 C.J.S., Costs § 33, 35.

§§ 11-53-27 and 11-53-29. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-53-27. [Codes, Hutchinson's 1848, ch. 61, art. 1 (74); 1857, ch. 61, art. 255; 1880, § 2375; 1892, § 875; 1906, § 952; Hemingway's 1917, § 661; 1930, § 668; 1942, § 1579]

§ 11-53-29. [Codes, 1892, § 876; 1906, § 953; Hemingway's 1917, § 662; 1930, § 669; 1942, § 1580]

Editor's Notes — Former § 11-53-27 related to successful party to recover costs generally.

Former § 11-53-29 related to successful defendant recovers costs, though plaintiff recover against others.

§ 11-53-31. Successful party liable for certain costs.

All costs accrued at the instance of the successful defendant in a suit, which cannot be collected out of the other party, may be collected from such defendant; and after return of "no property" on execution against a plaintiff or

complainant against whom costs were adjudged, execution may be issued against the successful defendant for all cost accrued at his instance and not paid or collected from the other party. A successful plaintiff or complainant shall be liable for all the costs of the case accrued at his instance which cannot be collected from the defendants; and after return of "no property" on execution against the defendant against whom costs were adjudged, execution may be issued against the successful plaintiff or complainant for all the costs of the case accrued at his instance not paid or collected from the defendant. An unsuccessful plaintiff or complainant shall be liable for all the costs of the case.

HISTORY: Codes, 1880, § 2381; 1892, § 877; 1906, § 954; Hemingway's 1917, § 663; 1930, § 670; 1942, § 1581.

Cross References — Rule covering the awarding of costs to litigants, see Miss. R. Civ. P. 54.

JUDICIAL DECISIONS

1. In general.

The state employment security commission is not exempted from the payment of court costs incurred in connection with litigation in which it engages. *Mississippi Employment Sec. Com. v. Wilks*, 251 Miss. 744, 171 So. 2d 157, 1965 Miss. LEXIS 898 (Miss. 1965).

Where no property of plaintiff could be found, a successful defendant was liable for the jury-tax of \$3. *Gulf & S. I. R. Co. v. Mitchell*, 112 Miss. 560, 73 So. 577, 1916 Miss. LEXIS 146 (Miss. 1916).

Where by the fault of the defendant in not keeping accounts as he obligated himself to do, a large volume of testimony was necessarily taken touching a great number of items, the supreme court will adjudge defendant to pay two-thirds of the cost of his appeal, although it reverses the decree appealed from by him because of errors in respect to several of said items. *Rowan v. Lamb*, 83 Miss. 45, 35 So. 427, 1903 Miss. LEXIS 11 (Miss. 1903).

OPINIONS OF THE ATTORNEY GENERAL

Unsuccessful civil action brought in name of county would nevertheless, subject county to same liability as to court cost, i.e. constable fees, that any other civil plaintiff would be required to pay into court for said services. *Gann*, March 21, 1990, A.G. Op. #90-0184.

Under Section 11-53-31, a tax collector does have to prepay the sheriff's fee, therefore, if there is no property found upon which to execute, a tax collector will lose the money used to pay the sheriff's fee. *Hollimon*, July 12, 1996, A.G. Op. #96-0400.

RESEARCH REFERENCES

ALR.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 86, 9 et seq.

CJS.

20 C.J.S., Costs §§ 10 et seq., 53, 54.

§ 11-53-33. Costs not recovered in some cases — limited in others.

In actions of assault, assault and battery, libel and slander, if the plaintiff recover less than Ten Dollars (\$10.00), costs shall not be awarded to him. In all other actions sounding in damages, where the plaintiff sues for more than Ten Dollars (\$10.00) and recovers less than that sum, no more costs than the amount of damages recovered shall be awarded to him, unless the court be of the opinion that the plaintiff had reasonable cause to expect to recover more, and that the action was brought for no other purpose than to be compensated for the wrong done, and enter the same on its minutes. If more costs be awarded, the judgment may be amended on motion at any time.

HISTORY: Codes, Hutchinson's 1848, ch. 61, art. 2 (17); 1857, ch. 61, art. 256; 1880, § 2376; 1892, § 878; 1906, § 955; Hemingway's 1917, § 664; 1930, § 671; 1942, § 1582.

Cross References — Actionability of words generally, see § 95-1-1.
Punishment of one convicted of writing or publishing any libel, see § 97-3-55.
Truth as defense in criminal prosecution for libel, see § 97-3-57.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 1582] governs in action ex delicto. It was enacted to discourage frivolous and vexatious litigation.

Kansas City, M. & B. R. Co. v. Mabry, 67 Miss. 131, 7 So. 224, 1889 Miss. LEXIS 50 (Miss. 1889).

RESEARCH REFERENCES

ALR.

Validity, construction, and application of statute limiting damages recoverable for defamation. 13 A.L.R.2d 277.

Who is protected by statute restricting recovery unless retraction is demanded. 84 A.L.R.3d 1249.

Libel and slander: Charging one with breach or nonperformance of contract. 45 A.L.R.5th 739.

Validity, Construction, and Application of State Vexatious Litigant Statutes. 45 A.L.R.6th 493.

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 2, 5, 14.

CJS.

20 C.J.S., Costs §§ 19 et seq.

§ 11-53-35. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.
[Codes, 1857, ch. 62, art. 56; 1871, § 1035; 1880, § 2374; 1892, § 879; 1906, § 956; Hemingway's 1917, § 665; 1930, § 672; 1942, § 1583]

Editor's Notes — Former § 11-53-35 related to costs discretionary in chancery.

§ 11-53-37. Costs in class suits.

Where a party hereafter institutes a suit for the benefit of himself and all

others similarly situated, and thereby there is in such suit recovered or preserved property or a fund for the common benefit, the chancery court may make an allowance to such party of the reasonable costs incurred, which costs shall include the necessary disbursements, and reasonable solicitor's fees, out of the property recovered or preserved for the common benefit.

HISTORY: Codes, 1942, § 1583.5; Laws, 1948, ch. 234.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Class actions not available.

1. In general.

Section 11-53-37 does not apply to public service litigation. *Fordice v. Thomas*, 649 So. 2d 835, 1995 Miss. LEXIS 34 (Miss. 1995), but see USPCI of Mississippi v. State ex rel. McGowan, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

An attorney's fee is properly allowed to attorneys for successful appellees in a proceeding involving the construction of a will. *In re Will of Powell*, 239 Miss. 10, 121 So. 2d 1, 1960 Miss. LEXIS 261 (Miss. 1960).

2. Class actions not available.

Miss. Code Ann. § 11-53-37 explained how attorney's fees would be awarded in class actions in chancery if there was an equitable class action; if and when the Mississippi Supreme Court chose to adopt a class action rule, § 11-53-37 would become operable again, as it was decades ago. It served no function currently because there were no class actions under the Mississippi Rules of Civil Procedure, whether in circuit or chancery court; the chancery court erred in concluding otherwise. *USF&G Ins. Co. v. Walls*, 2004 Miss. LEXIS 657 (Miss. June 10, 2004).

RESEARCH REFERENCES

ALR.

Attorneys' fees in class actions. 38 A.L.R.3d 1384.

Attorneys' fees; cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Award of attorneys' fees under § 204(b) of Civil Rights Act of 1964 (42 USCS § 2000a-3(b)) authorizing court to allow prevailing party, other than United States, reasonable attorney's fee as part of costs in action under public accommodations part of Act. 16 A.L.R. Fed. 621.

Award of attorneys' fees under § 706(k) of Civil Rights Act of 1964 (42 USCS § 2000e-5(k)) authorizing court to allow prevailing party, other than Equal Em-

ployment Opportunity Commission or United States, reasonable attorney's fee as part of costs in action under equal employment opportunities part of Act. 16 A.L.R. Fed. 643.

Construction and application of "common fund" doctrine in allocating attorneys' fees among multiple attorneys whose efforts were unequal in benefiting multiple claimants. 42 A.L.R. Fed. 134.

Am. Jur.

20 Am. Jur. 2d (Rev), Costs § 30.

Law Reviews.

Tort Reform by the Mississippi Supreme Court, 24 Miss. C. L. Rev. 427, Spring, 2005.

§ 11-53-39. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.
[Codes, Hutchinson's 1848, ch. 49, art. 1 (111); 1857, ch. 60, art. 119; 1880,

§ 2377; 1892, § 880; 1906, § 957; Hemingway's 1917, § 666; 1930, § 673; 1942, § 1584]

Editor's Notes — Former § 11-53-39 related to executors and administrators entitled to and liable for costs.

§ 11-53-41. Executors and administrators entitled to and liable for costs — when not individually liable.

When costs are adjudged against an executor or administrator in a suit at law or in equity, and he shall obtain the certificate of the court before which the suit was tried that there was probable cause for bringing or defending the same, he shall not be individually liable for costs, although the estate may be insufficient to pay them.

HISTORY: Codes, 1857, ch. 60, art. 132; 1880, § 2378; 1892, § 881; 1906, § 958; Hemingway's 1917, § 667; 1930, § 674; 1942, § 1585.

JUDICIAL DECISIONS

1. In general.

Where a verdict is rendered against an administrator in a suit brought by him, and he obtains a certificate from the courts, under this section [Code 1942, § 1585], exempting him personally from the costs upon such certificate, that there was probable cause of bringing the suit, a judgment for costs should not be rendered against the sureties on a voluntary bond given by the plaintiff limiting their liability to the payment of such costs as might be adjudged against the plaintiff involuntarily. *Nichols v. Gulf & S. I. R. Co.*, 83 Miss. 126, 36 So. 192, 1903 Miss. LEXIS 20 (Miss. 1903).

The statute does not absolve an administrator from liability for costs incurred by him in the service of process for his witness fees, and the cost of a transcript on appeal, whether he be successful or not in prosecuting or defending the suit. *Campbell v. Doyle*, 57 Miss. 292, 1879 Miss. LEXIS 73 (Miss. 1879).

The administrator will not be allowed for costs in his accounts unless he obtains the certificate provided in the statute. *Williamson v. Childress*, 26 Miss. 328, 1853 Miss. LEXIS 96 (Miss. 1853); *Effinger v. Richards*, 35 Miss. 540, 1858 Miss. LEXIS 57 (Miss. 1858).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 30- 31.

CJS.

20 C.J.S., Costs §§ 56, 60.

§ 11-53-43. Executors and administrators entitled to and liable for costs — in their administration.

Executors and administrators shall be personally liable for the fees which accrue in the administration, and the estates in their hands shall be chargeable with such fees in preference to all other demands. It shall be lawful for the clerk of the chancery court to make out executions for the fees that may become due the officers of court or the publisher of a newspaper at any time in the administration of an estate. Every such execution shall have annexed to it a

copy of the bill of costs, specifying the particular items thereof, to be enforced as in other cases.

HISTORY: Codes, 1880, § 2379; 1892, § 882; 1906, § 959; Hemingway's 1917, § 668; 1930, § 675; 1942, § 1586.

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 30- 31.

CJS.

20 C.J.S., Costs §§ 56, 60.

§ 11-53-45. Next friend of infant liable for costs.

If in any case the plaintiff or complainant be an infant suing by next friend, such next friend shall be liable for costs.

HISTORY: Codes, 1880, § 2380; 1892, § 883; 1906, § 960; Hemingway's 1917, § 669; 1930, § 676; 1942, § 1587.

Cross References — Power of chancery court to appoint guardian ad litem to infant, see § 9-5-89.

Institution of proceedings by next friend of minor to remove disability of minority, see § 93-19-3.

RESEARCH REFERENCES

ALR.

Validity of statute allowing attorneys'

fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

§ 11-53-47. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2382; 1892, § 884; 1906, § 961; Hemingway's 1917, § 670; 1930, § 677; 1942, § 1588]

Editor's Notes — Former § 11-53-47 related to costs as between defendants.

§ 11-53-49. Costs in cases of setoff.

When a setoff is pleaded or filed and established, the defendant shall recover of the plaintiff his costs expended in establishing it, although judgment be rendered in favor of the plaintiff for a balance due him.

HISTORY: Codes, 1880, § 2385; 1892, § 885; 1906, § 962; Hemingway's 1917, § 671; 1930, § 678; 1942, § 1589.

JUDICIAL DECISIONS

1. In general.

Trial court does not abuse its discretion by entering order allowing plaintiff to recover full costs in action for recovery of

damages caused by killing of one milch cow and wounding of three others, in which action defendant claimed and was allowed \$50 damages on account of corn

destroyed by plaintiff's cattle, since defendant was not entitled to set off in tort action unliquidated damages caused by

separate tort on part of plaintiff. *Vines v. Perry*, 208 Miss. 869, 45 So. 2d 734, 1950 Miss. LEXIS 307 (Miss. 1950).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 11, 12.

CJS.

20 C.J.S., Costs § 13.

§ 11-53-51. Costs in cases of appeal from justices of the peace.

In cases of appeal from a judgment of a justice of the peace, if the appeal be by the defendant, and judgment be rendered thereon for the plaintiff equal to or greater than that recovered by him before the justice of the peace, he shall recover of the defendant full costs; but if the judgment for plaintiff be less than that recovered by him before the justice of the peace, the court may, on motion of defendant, apportion the costs between the parties as may be proper, otherwise defendant shall be liable for all the costs. If the judgment on such appeal be rendered for the defendant, he shall recover of the plaintiff full costs. If the appeal be by plaintiff from a judgment rendered against him, and he recover judgment thereon, he shall recover of the defendant full costs; but if the defendant recover judgment thereon, he shall recover of plaintiff full costs. If a party appeal from a judgment in his favor, and does not obtain judgment for more than he recovered before the justice of the peace, he shall not recover costs that accrued on appeal, but shall be liable for such costs. But in such cases the circuit court, may, when the circumstances justify it, tax the costs to meet the ends of justice. In all cases where the principal is made liable for costs, judgment shall be rendered therefor against him and the sureties on his appeal bond jointly.

HISTORY: Codes, 1871, § 1597; 1880, §§ 2354, 2384; 1892, § 886; 1906, § 963; Hemingway's 1917, § 672; 1930, § 679; 1942, § 1590.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Trial of case on appeal from justice of the peace court to circuit court, see § 11-51-91.

Duty of circuit court clerk to tax costs accruing on trial before justice of the peace of case appealed to circuit court, see § 11-53-71.

JUDICIAL DECISIONS

1. In general.

On appeal of a cause by a defendant from justice's court to the circuit court, the successful plaintiff may be required to furnish security for costs, since the case will be tried anew, and the rights of both parties are the same as if the suit had been originally brought in the circuit court; the plaintiff enjoys the privilege of

seeking a larger judgment and is confronted with the possibility of liability or further cost in the event he loses his case or recovers judgment for less than the amount appealed from. *Archer v. High*, 193 Miss. 361, 9 So. 2d 647, 1942 Miss. LEXIS 118 (Miss. 1942).

The statute arms the circuit court with authority as to the costs on appeals from

justices' courts, under which any abuse by a defendant of the right to interpose a defense for the first time in the circuit court could be prevented from doing in-

jury to the plaintiff. *D. Callahan & Co. v. Newell*, 61 Miss. 437, 1884 Miss. LEXIS 105 (Miss. 1884).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 812.

§ 11-53-53. Costs in cases of certiorari and appeals from certain inferior tribunals.

In all cases of certiorari upon the judgment of any inferior court or tribunal, and the cases of appeal from the judgment of a board or supervisors, of a court of unlawful entry and detainer, of any municipal board or court, the successful party shall be entitled to recover full costs; but the circuit court may, when the circumstances of the case justify it, tax the costs to meet the ends of justice.

HISTORY: Codes, 1880, § 2384; 1892, § 887; 1906, § 964; Hemingway's 1917, § 673; 1930, § 680; 1942, § 1591.

Cross References — Use of certiorari to review cases decided by justices of the peace in circuit court, see § 11-51-93.

Use of certiorari to review judgments of tribunals inferior to circuit court, see § 11-51-95.

Duty of circuit court clerk to tax costs accruing on trial before any inferior tribunal or court of case appealed to the circuit court, see § 11-53-71.

JUDICIAL DECISIONS

1. In general.

Trial court did not abuse discretion in taxing costs of condemnation proceedings against county, though recovery was less

than damage allowed. *Yalobusha County v. Davis*, 148 Miss. 153, 114 So. 34, 1927 Miss. LEXIS 7 (Miss. 1927).

RESEARCH REFERENCES

Am. Jur.

5 Am. Jur. 2d (Rev), Appellate Review §§ 812.

§ 11-53-55. Cases not expressly embraced by statute or Rule.

If a case shall occur in any court not embraced expressly by statute, Mississippi Rules of Civil Procedure or Mississippi Supreme Court Rules, the court may make such order for the payment of costs by any of the parties as, in its discretion, may be proper.

HISTORY: Codes, 1880, § 2386; 1892, § 889; 1906, § 966; Hemingway's 1917,

§ 675; 1930, § 682; 1942, § 1593; Laws, 1993, ch. 452, § 2, eff from and after passage (approved March 22, 1993).

Cross References — Payment of costs of causes transferred from chancery court to circuit court, or vice versa, see § 11-1-41.

JUDICIAL DECISIONS

1. In general.

Consolidated cases never lose their identity as separate and distinct cases for purposes of assessment of costs. The court has no authority to assess costs in one of the consolidated cases against one who was a party only in the other case. Adoption of *Karenina v. Presley*, 526 So. 2d 518, 1988 Miss. LEXIS 244 (Miss. 1988).

On a motion to retax costs, costs of the appeal would be taxed one-half against each party where the appellant had obtained reversal of that portion of the judgment which awarded appellee punitive damages but that portion of the judgment awarding appellee actual damages had been affirmed. *Gulf Guaranty Life Ins. Co. v. Kelley*, 392 So. 2d 518, 1981 Miss. LEXIS 1906 (Miss. 1981).

Under the rule authorizing a court to exercise its discretion in the assessment of costs in certain cases, the cost of appeal would be assessed one half to each party in the case where the status of the plaintiff was that of an unsuccessful appellant and a successful cross appellee although a successful but dissatisfied plaintiff below, while a defendant was a successful appellee and an unsuccessful cross appellant. *Pearce v. Ford Motor Co.*, 235 So. 2d 281, 1970 Miss. LEXIS 1442 (Miss. 1970).

Where a claimant, appealing from the decision of the workmen's compensation commission to the circuit court, successfully contended that he was entitled to recover the 20 per cent penalty as provided for in Code 1942, § 6998-19 (f), but was unsuccessful as to his contention that the entire award should have been judged to be due and payable, as provided in Code 1942, § 6998-25, the court was authorized under this section [Code 1942, § 1593] to apportion the cost between the parties. *T. C. Fuller Plywood Co. v. Moffett*, 231 Miss. 382, 95 So. 2d 475, 1957 Miss. LEXIS 523 (Miss. 1957).

Where an award of appeal costs had been an authorized act of the supreme court clerk and the question of appeal costs was not brought to the attention of the court, a motion to correct a decree entered by changing award of costs so to assess the costs evenly between the parties, was not in effect a suggestion of error. *Shipman v. Lovelace*, 215 Miss. 141, 60 So. 2d 559, 1952 Miss. LEXIS 546 (Miss. 1952).

Trial court did not abuse its discretion by its judgment reciting that in court's opinion plaintiff had reasonable ground to expect to recover more than \$200 from defendant and ordering that plaintiff recover full costs in action for recovery of \$225 actual damages and punitive damages for killing of milch cow and injuring three others, particularly where jury failed to award damage for injury to one cow in awarding plaintiff \$192. *Vines v. Perry*, 208 Miss. 869, 45 So. 2d 734, 1950 Miss. LEXIS 307 (Miss. 1950).

On appeal of a cause by a defendant from justice's court to the circuit court, the successful plaintiff may be required to furnish security for costs, since the case will be tried anew, and the rights of both parties are the same as if the suit had been originally brought in the circuit court; the plaintiff enjoys the privilege of seeking a larger judgment and is confronted with the possibility of liability or further cost in the event he loses his case or recovers judgment for less than the amount appealed from. *Archer v. High*, 193 Miss. 361, 9 So. 2d 647, 1942 Miss. LEXIS 118 (Miss. 1942).

The power to order payment of costs by either party under the section [Code 1942, § 1593] arises only where no provision has been made by law, "expressly or by fair implication," for the payment of costs. *Clarke v. Parker*, 63 Miss. 549, 1886 Miss. LEXIS 136 (Miss. 1886).

The discretion given by the statute to the trial court in the matter of taxation of costs will not be interfered with. Highland

A. & B. R. Co. v. Robinson, 125 Ala. 483, 28 So. 28, 1899 Ala. LEXIS 321 (Ala. 1899).

RESEARCH REFERENCES

ALR.

Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust. 9 A.L.R.2d 1132.

§ 11-53-57. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 33, art. 4 (2); 1857, ch. 8, art. 2; 1880, § 2387; 1892, § 890; 1906, § 967; Hemingway's 1917, § 676; 1930, § 683; 1942, § 1594]

Editor's Notes — Former § 11-53-57 related to taxation of costs – what costs taxed.

§§ 11-53-59 and 11-53-61. Repealed.

Repealed by Laws of 1977, ch. 408, § 2, eff from and after passage (approved March 29, 1977), and further providing that any funds previously collected under said section shall be paid to the circuit clerk of each county and utilized in accordance with the provisions of this section.

§ 11-53-59. [Codes, 1942, § 1594.5; Laws, 1962, chs. 298, 304; Laws, 1964, ch. 321; Laws, 1968, ch. 331, § 1; Laws, 1968, ch. 332, § 1; Laws, 1969 Ex Sess, ch. 21, § 1; Laws, 1971, ch. 420, § 1, eff from and after passage (approved March 23, 1971); Am 1972, ch. 442, § 1]

§ 11-53-61. [Codes, 1942, § 1594.7; Laws, 1970, ch. 338, § 1, eff from and after the first day of the next succeeding month after passage (approved March 6, 1970)]

Editor's Notes — Former § 11-53-59 related to collection of library fee as costs in certain counties.

Former § 11-53-61 related to collection of library fees as costs in additional counties.

§ 11-53-63. Repealed.

Repealed by Laws of 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1880, § 2383; 1892, § 891; 1906, § 968; Hemingway's 1917, § 677; 1930, § 684; 1942, § 1595]

Editor's Notes — Former § 11-53-61 related to retaxation of costs.

§ 11-53-65. Bill of costs made and filed.

When a cause shall be determined, the clerk of the court, and the justice of the peace in cases had before him, shall tax the costs of the case and make out a bill thereof, specifying therein each section of the law, and each paragraph or subdivision of section, if any, by virtue of which each fee or item

of costs therein is charged or taxed, and he shall file the same with the papers in the cause.

HISTORY: Codes, 1857, ch. 8, art. 3; 1880, § 2388; 1892, § 892; 1906, § 969; Hemingway's 1917, § 678; 1930, § 685; 1942, § 1596.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Duty of circuit court clerk to deliver to clerk of the board of supervisors certified list of allowances made by court, payable out of county treasury, see § 9-7-129.

Duty of justice of peace to give itemized receipt to any person paying fees or costs, see § 9-11-21.

Preparation by clerk of supreme court of fee-bill of fees adjudged against state, see § 25-7-7.

Duty of district attorney to pass on all accounts of public nature before they are allowed by circuit court, see § 25-31-15.

JUDICIAL DECISIONS

1. In general.

Where the clerk's cost bill was not properly itemized, was apparently excessive for the reason that nearly 40 witness subpoenas were improperly copied into the record, and the court reporter's cost bill did not contain a certificate of a number of words transcribed, appellant was granted leave to file a motion to retax costs. *Conn v. State*, 231 Miss. 835, 97 So. 2d 923, 1957 Miss. LEXIS 569 (Miss. 1957).

Where a chancery clerk in preparing his certified statement of transcript fees stated the rate charged and the total sum for preparing the transcript, but failed to disclose the number of the words in the transcript, the certificate was null and void. *Superior Oil Co. v. Foote*, 216 Miss. 728, 65 So. 2d 453, 1953 Miss. LEXIS 687 (Miss. 1953).

Until this section [Code 1942, § 1596] is complied with, no taxation of costs has been made, as respects right to retaxation thereof. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

Compliance with statute (Code 1942, § 1597), providing that fees and costs shall not be payable until person chargeable has been presented with a bill containing the particulars of such fees signed by the clerk or officer is dependent upon a taxation of costs in accordance with section of statute requiring taxation of costs and preparation of a bill thereof, specifying the section of law by virtue of which each fee is charged. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

Taxation of costs by clerk of supreme court based upon trial court's certificate which stated aggregate amount of fees for making transcript and for other services rather than itemizing the account to show amount of fee for transcript would be set aside except in so far as it taxed fees due clerk of supreme court, but with permission granted to clerk of trial court to file a proper certificate and without prejudice to appellant to move for retaxation of costs. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs § 86.
Taxation of costs, 7 Am. Jur. Pl & Pr Forms (Rev), Costs, Forms 91-109.

CJS.

20 C.J.S., Costs §§ 163-165.

§ 11-53-67. Fees not payable until bill produced.

Fees and costs shall not be payable by any person until there be produced to the person chargeable with the same a bill, or account in writing, containing the particulars of such fees, signed by the clerk or officer, in which shall be intelligently expressed and specified each section of the law, and, if any, each paragraph or subdivision of section by virtue of which each fee is charged. If any fee shall be paid without the production of such bill, the party paying the same shall at all times be entitled to demand and have from the officer receiving the same a copy of such bill without charge.

HISTORY: Codes, Hutchinson's 1848, ch. 33, art. 4 (4); 1857, ch. 8, art. 3; 1880, § 2389; 1892, § 893; 1906, § 970; Hemingway's 1917, § 679; 1930, § 686; 1942, § 1597.

JUDICIAL DECISIONS

1. In general.

Where a chancery clerk in preparing his certified statement of transcript fees stated the rate charged and the total sum for preparing the transcript, but failed to disclose the number of the words in the transcript, the certificate was null and void. *Superior Oil Co. v. Foote*, 216 Miss. 728, 65 So. 2d 453, 1953 Miss. LEXIS 687 (Miss. 1953).

This section [Code 1942, § 1597] is inapplicable to require sheriff's claim presented to county board of supervisors for services required of the sheriff by board of supervisors for which no fees were fixed and for executing decrees, judgments, orders of process of the supreme court, chancery courts, or board of supervisors, to contain detailed itemization of the particular instances of such services. *Board of Supervisors v. Jones*, 199 Miss. 373, 24 So.

2d 844, 1946 Miss. LEXIS 206 (Miss. 1946).

Compliance with this section [Code 1942, § 1597] is dependent upon a taxation of costs in accordance with Code 1942, § 1596. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

Taxation of costs by clerk of supreme court based on trial court's certificate of aggregate amount of fees for transcript and other services rather than itemized account showing fee for transcript, set aside, except as to fees due clerk of supreme court, with permission to clerk of trial court to file a proper certificate, and without prejudice to appellant's moving for retaxation of costs. *McDonald v. Spence*, 179 Miss. 348, 176 So. 607, 1937 Miss. LEXIS 72 (Miss. 1937).

RESEARCH REFERENCES

CJS.

20 C.J.S., Costs § 224.

§ 11-53-69. Costs not due until suit ended.

The costs accruing upon suits in any court shall not be due until the final determination thereof, and may then be collected by execution; but the judges shall have power to order and adjudge costs and give decrees and judgments thereon in the progress of suits, as heretofore practised in said courts.

HISTORY: Codes, 1857, ch. 8, art. 8; 1880, § 2392; 1892, § 894; 1906, § 971; Hemingway's 1917, § 680; 1930, § 687; 1942, § 1598.

Cross References — Duty of circuit court clerk to issue execution, after adjournment of every term, for all fines, penalties, and forfeitures assessed by court and remaining due and unpaid, see §§ 11-7-217, 99-19-65.

Liability of clerks, sheriffs, and other officers for neglect of duty in respect to executions for fines, penalties, and forfeitures, see §§ 11-7-221, 99-19-69.

Provision for additional costs to create court education and training fund, see §§ 37-26-1 et seq.

JUDICIAL DECISIONS

1. In general.

No authority is conferred by this section [Code 1942, § 1598] to require a defendant to post security for costs. *Martin v. McGraw*, 249 Miss. 334, 160 So. 2d 89, 161 So. 2d 784, 1964 Miss. LEXIS 530 (Miss. 1964).

No authority for requiring a defendant to pay a filing fee as a condition for receiving a defensive pleading is conferred by this section [Code 1942, § 1598]. *Martin v. McGraw*, 249 Miss. 334, 160 So. 2d 89, 161 So. 2d 784, 1964 Miss. LEXIS 530 (Miss. 1964).

Where a law authorizes a party recovering costs to file the certificates of his

witnesses, the fees of whom he has paid, and have the same included in an execution for costs, this does not apply to the fees of witnesses for an unsuccessful party. They have merely a claim against him, enforceable by suit. *Hall v. Moore*, 70 Miss. 75, 11 So. 655, 1892 Miss. LEXIS 63 (Miss. 1892).

One at whose instance an execution for costs is issued, having by agreement with the officers of the court control of the execution, stands, as the officers would, in the attitude of a public trustee and cannot use the process for oppression or speculation. *Hall v. Moore*, 70 Miss. 75, 11 So. 655, 1892 Miss. LEXIS 63 (Miss. 1892).

RESEARCH REFERENCES

CJS.

20 C.J.S., Costs § 224.

§ 11-53-71. Taxation of costs in cases from justices of the peace.

The clerk of the circuit court is required to tax in the bill of costs, after final judgment, all the costs that accrued on the trial before a justice of the peace, or before any other inferior tribunal or court, in all cases carried to the circuit court by appeal or by certiorari, and include the same in the execution issued for the costs accruing in the case in the circuit court.

HISTORY: Codes, 1880, § 2659; 1892, § 895; 1906, § 972; Hemingway's 1917, § 681; 1930, § 688; 1942, § 1599.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appeals from judgments of justices rendered in cases of unlawful entry and detainer, see § 11-51-83.

Appeals from judgments of justices of the peace in civil cases, see § 11-51-85.

Trial of cases on appeal from justice of the peace court to circuit court, see § 11-51-91.

Imposition of costs in cases of appeal from judgments of justices of the peace, see § 11-53-51.

Imposition of costs in cases of certiorari and appeals from certain inferior tribunals, see § 11-53-53.

Appeals from judgments of certain inferior courts in criminal cases, see §§ 99-35-1 et seq.

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 84 et seq.
Taxation of costs, 7 Am. Jur. Pl & Pr
Forms (Rev), Costs, Forms 91-109.

CJS.

20 C.J.S., Costs §§ 156 et seq.

§ 11-53-73. Execution for costs.

It shall be lawful for the clerks of the several courts, when suits or causes are determined and the fees not paid by the party from whom they are due, to make out executions, directed to the sheriff or other proper officer of the county where the party resides; and the sheriff or other officer shall execute and return such execution as in other cases.

HISTORY: Codes, Hutchinson's 1848, ch. 33, art. 4 (5); 1857, ch. 8, art. 5; 1880, § 2390; 1892, § 896; 1906, § 973; Hemingway's 1917, § 682; 1930, § 689; 1942, § 1600.

Cross References — Another section derived from same 1942 code section, see § 11-53-75.

Time within which executions on judgments and decrees shall be issued, see § 13-3-111.

Issuance and return of executions generally, see § 13-3-113.

JUDICIAL DECISIONS

1. In general.

Sales under execution issued to satisfy costs taxed against surety on appeal bond is void, where execution was issued and

levy made in one county, and surety lived in another. *Griffin v. Hickman*, 92 Miss. 266, 46 So. 73, 1908 Miss. LEXIS 209 (Miss. 1908).

RESEARCH REFERENCES

Am. Jur.

20 Am. Jur. 2d (Rev), Costs §§ 84, 89, 90.

CJS.

20 C.J.S., Costs §§ 233-236.

§ 11-53-75. Bill of costs appended to execution.

On all executions in which any costs are included, there shall be entered thereon or annexed a copy of the bill of costs, specifying the particular items thereof, in intelligible words and figures, and each section of the law, and, if any, each paragraph or subdivision of section by virtue of which each item therein is charged; and all such executions issuing without the copy of such bill of costs shall be illegal, and the sheriff or other officer shall not execute the same. The sheriff or other officer receiving the same shall add thereto, in like manner, his fees, including all additional fees and costs, and shall make out a

fair copy of the same and deliver it, on demand, to the person from whom he receives the money or out of whose property he makes the same.

HISTORY: Codes, Hutchinson's 1848, ch. 33, art. 4 (5); 1857, ch. 8, art. 5, 6; 1880, §§ 2390, 2391; 1892, §§ 896, 897; 1906, §§ 973, 974; Hemingway's 1917, §§ 682, 683; 1930, §§ 689, 690; 1942, §§ 1600, 1601.

Cross References — Another section derived from same 1942 code section, see § 11-53-73.

JUDICIAL DECISIONS

1. In general.

Execution for costs accruing in criminal case held quashable on motion, where execution contained no itemized bill for costs specifying sections of law by virtue of which items were charged. *Riley v. State*, 175 Miss. 831, 168 So. 475, 1936 Miss. LEXIS 86 (Miss. 1936).

Execution sale of land without having bill of costs attached thereto is void, and may be quashed on motion. *Wilkinson v. Hutto*, 157 Miss. 358, 128 So. 93, 1930 Miss. LEXIS 292 (Miss. 1930).

No costs can be collected under execution not having statement of costs attached. *Mills v. Churchwell Motor Co.*, 154

Miss. 631, 122 So. 773, 1929 Miss. LEXIS 175 (Miss. 1929).

Failure to annex to execution copy of bill of costs does not render execution void in so far as it commands collection of principal of judgment. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773, 1929 Miss. LEXIS 175 (Miss. 1929).

Judgment against claimant of property levied on and sureties for costs accrued in justice court proceedings held erroneous, where copy of bill of costs was not annexed to execution. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773, 1929 Miss. LEXIS 175 (Miss. 1929).

RESEARCH REFERENCES

ALR.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 A.L.R.3d 515.

CJS.

20 C.J.S., Costs §§ 163-165, 233-236.

Am. Jur.

20 Am. Jur. 2d, Costs §§ 84, 86, 90.

§ 11-53-77. Combining orders and decrees to save costs.

It shall be the duty of the judges of the several courts to require the clerks to combine in one judgment or decree as many interlocutory or other orders as can be lawfully and conveniently done, with a view to prevent the increase of costs, and, on application of any party, to correct any incorrect bill of costs as charged and made out by a clerk.

HISTORY: Codes, 1857, ch. 8, art. 10; 1880, § 2393; 1892, § 898; 1906, § 975; Hemingway's 1917, § 684; 1930, § 691; 1942, § 1602.

§ 11-53-79. Table of fees to be posted conspicuously.

It shall be the duty of the clerks of the circuit and chancery courts, and of the sheriff, to post in a conspicuous place in his office, and each justice of the peace at his place of holding court, a copy of the bill of fees which he is entitled to receive, and on failure to do so he shall not be entitled to receive or collect any fee for any service rendered during the time of such failure.

HISTORY: Codes, 1857, ch. 8, art. 11; 1880, § 2394; 1892, § 899; 1906, § 976; Hemingway's 1917, § 685; 1930, § 692; 1942, § 1603.

Editor's Notes — Pursuant to Miss. Const., Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Fees chargeable by chancery court clerks, see § 25-7-9.

Fees chargeable by circuit court clerks, see § 25-7-13.

Fees chargeable by sheriffs, see § 25-7-19.

Fees chargeable by justices of the peaces, see § 25-7-25.

§ 11-53-81. Recovery of attorney's fees in suit on open account.

When any person fails to pay an open account within thirty (30) days after receipt of written demand therefor correctly setting forth the amount owed and an itemized statement of the account in support thereof, that person shall be liable for reasonable attorney's fees to be set by the judge for the prosecution and collection of such claim when judgment on the claim is rendered in favor of the plaintiff. Evidence of receipt of written demand by the spouse of the debtor when they are living together as husband and wife on behalf of the debtor may be introduced as evidence of written demand on the debtor. If that person sued on the open account shall prevail in the suit, he shall be entitled to reasonable attorney's fees to be set by the judge.

If delivery of written demand on the debtor is attempted, but not accomplished because circumstances made delivery of written demand impossible, a notation, on the envelope containing the written demand, made by the person attempting delivery stating the date of the attempted delivery, the reasons why delivery could not be accomplished along with the initials of the person attempting delivery and making said notation may be introduced as evidence of written demand on the debtor, and if the judge in his discretion finds that sufficient evidence of due diligence in delivery of written demand has been made, he may make a conclusion of written demand for purposes of justice and find that there has been written demand on the debtor.

HISTORY: Laws, 1980, ch 443, eff from and after July 1, 1980.

Cross References — Office confession of judgment on debt, see § 11-7-181.

When statute of limitation commences to run on open account, see §§ 15-1-21 and 15-1-31.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. "Prevailing plaintiff."
3. Counterclaims.
4. Difference between demand letter and complaint.

1. In general.

Because the principal of a health care provider was not personally liable under Mississippi's open-account statute on the claims brought against the health care provider and the principal by a medical supply business, the principal was entitled to an attorney fees. *Patton Med. of Gulf Coast, Inc. v. Relle*, 269 So. 3d 266, 2018 Miss. App. LEXIS 156 (Miss. Ct. App. 2018).

Company was awarded one-half of the attorney's fees and expenses awarded to it by the circuit court because it was reasonable to award a company its attorney's fees for post-judgment collection efforts that resulted in garnishments; the company's attorney's fees in defending the appeal would be proper under the open account statute. *Knights Marine & Indus. Servs. v. Gulfstream Enters.*, 216 So. 3d 1164, 2017 Miss. App. LEXIS 207 (Miss. Ct. App. 2017).

In a company's action under the open account statute, the county court's denial of punitive damages was proper because the trier of fact could easily have found that a contractor did not act with a sufficient level of malice to warrant them; the record indicated that the contractor attempted to negotiate a settlement with the company and was nearly successful. *Knights Marine & Indus. Servs. v. Gulfstream Enters.*, 216 So. 3d 1164, 2017 Miss. App. LEXIS 207 (Miss. Ct. App. 2017).

County court properly awarded pre-judgment interest to a company because the company and a contractor were operating under an open account, a type of unwritten contract, and thus, the company had to be granted pre-judgment interest if the contractor's debt was liquidated; however, the county court erred in determining the date pre-judgment inter-

est began, and it should have calculated pre-judgment interest from the date the breach occurred. *Knights Marine & Indus. Servs. v. Gulfstream Enters.*, 216 So. 3d 1164, 2017 Miss. App. LEXIS 207 (Miss. Ct. App. 2017).

County court did not abuse its discretion in awarding a company compensatory damages in its action under the open account statute alleging a contractor failed to pay the balance owed to the company for providing a crew-transport vessel with a captain and crew because the company presented substantial evidence that it was hired to provide a vessel whether work was performed or not. *Knights Marine & Indus. Servs. v. Gulfstream Enters.*, 216 So. 3d 1164, 2017 Miss. App. LEXIS 207 (Miss. Ct. App. 2017).

Miss. Code Ann. § 11-53-81 does not mandate that a demand letter and a complaint list the same amount; rather, just a correct amount is required. *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So. 2d 974, 2007 Miss. App. LEXIS 771 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 341 (Miss. 2008).

Because a contractor ratified the course of conduct by paying on account for items purchased from a supply company on delivery tickets that were not signed by himself or his employees, the defense with without merit under Miss. Code Ann. § 75-2-204(1); because the record contained overwhelming evidence of an obligation owed by the contractor to the supply company for goods delivered on signed and unsigned delivery tickets, entry of judgment notwithstanding the verdict in favor of the supply company was proper, but there was evidence to suggest that mistakes in the invoices were made, and a new trial on the issue of damages alone was ordered. *Natchez Elec. & Supply Co. v. Johnson*, 968 So. 2d 358, 2007 Miss. LEXIS 512 (Miss. 2007).

Attorney fees are not available under Miss. Code Ann. § 11-53-81 when the claim is based on contract, and therefore in a case that originally sought to recover on an open account, there was no entitlement to attorney fees under § 11-53-81

because this issue was resolved in a pre-trial motion to dismiss and/or summary judgment; thereafter, the claims proceeded on contract. *H & E Equip. Servs., LLC v. Floyd*, 959 So. 2d 578, 2007 Miss. App. LEXIS 428 (Miss. Ct. App. 2007).

Court of appeals erred in reversing a jury's finding in favor of a contractor in an open account case filed by an electrical equipment supplier and granting a JNOV to the supplier; the contractor's defense was that the invoices were, inter alia, inaccurate and that overbilling was commonplace and the fact that the supplier had already credited the contractor \$19,025 due to billing errors and fired one of its employees because of the errors, carried weight with the jury. *Natchez Elec. & Supply Co. v. Johnson*, 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

In a dispute over the sale of certain tractors, the lower court ruled that it was an action on an open account, but despite some apparent past dealings between the parties, nothing in the record indicated that the transaction was predicated upon defendant's credit or an advance agreement to allow purchases on credit. The action was more properly characterized as an action in contract and the trial court's ruling and the judgment regarding attorney's fees were in error; a new trial was necessary to determine the terms of the contract, whether the parties mutually assented to the terms of the contract, and whether there was a breach of the contract. *Mauldin Co. v. Lee Tractor Co.*, 920 So. 2d 513, 2006 Miss. App. LEXIS 73 (Miss. Ct. App. 2006).

Circuit court did not err in awarding attorney fees to plaintiff who prevailed in the action for an open account and established evidence of reasonable attorney fees. *Prime Rx, LLC v. McKendree, Inc.*, 917 So. 2d 791, 2005 Miss. LEXIS 671 (Miss. 2005).

There was nothing to warrant a departure from the rule that accounts established by medical providers for services provided to their patients were open accounts within the purview of Miss. Code Ann. § 11-53-81, and attorney fees were allowable; moreover, pursuant to the default judgments, *res judicata* was applicable with regard to the questions regard-

ing the open account procedure because the debtors did not allege they were improperly served or that jurisdiction was improper in the justice court, and they did not dispute that the debt was actually owed. *Franklin Collection Serv. v. Stewart*, 863 So. 2d 925, 2003 Miss. LEXIS 870 (Miss. 2003).

An award of attorney's fees was appropriate under § 11-53-81 where the debtor did not satisfy its account in full with the creditor before the action on open account was heard on its merits by the trial court, the debtor did not pay the creditor the amount of accrued interest it owed despite notice from the creditor that it had not paid the full amount owed, and the creditor received a judgment against the debtor for the amount of its claim against the debtor that had yet to be satisfied. *Dynasteel Corp. v. Aztec Industries, Inc.*, 611 So. 2d 977, 1992 Miss. LEXIS 828 (Miss. 1992).

Plaintiff is not entitled to attorneys' fees under § 11-53-81 where its claim against defendant is based on contract rather than open account. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205, 1986 U.S. Dist. LEXIS 23550 (S.D. Miss. 1986).

Claimant under contractor's bond is not entitled to attorney's fees, notwithstanding that claimant might be entitled to such fees under § 11-53-81 in action on open account against defaulting contractor, since claimant on contract surety bond is not entitled to recover attorney's fees unless statute or contract with surety so requires, and in instant case surety's bond does not require payment of attorney's fees and no such payment is required by § 85-7-185, which governs instant bond pertaining to contract between private parties. *Kimberly-Clark Corp. v. Alpha Bldg. Co.*, 591 F. Supp. 198, 1984 U.S. Dist. LEXIS 15922 (N.D. Miss. 1984).

In an action by a creditor on an open account, the creditor was not a prevailing party within the meaning of § 11-53-81, and therefore could not recover attorney's fees under the statute, where it recovered no more than the debtor had unqualifiedly offered to pay without suit. Also, the debtor was not a prevailing party within the meaning of the statute even though it conceded prior to and during trial that it

owed the sum actually recovered by the creditor where it made no efforts to either pay the sum, tender it into court, or make an offer of judgment under Rule 68, Miss. R. Civ. P. *Rainbow Rental & Fishing Tools, Inc. v. Delta Underground Storage, Inc.*, 542 So. 2d 258, 1989 Miss. LEXIS 189 (Miss. 1989).

Judgment must be rendered in favor of defendant and against plaintiff to constitute defendant as prevailing party entitled to award of attorney fees under § 11-53-81. *Hughes Equipment Co. v. Fife*, 482 So. 2d 1144, 1986 Miss. LEXIS 2360 (Miss. 1986).

Attorney fees are not available under § 11-53-81 unless written demand is made upon debtor by means of demand letter 30 days prior to filing suit; notice and demand in form of complaint or lawsuit does not suffice. *Putt v. Ray Sewell Co.*, 481 So. 2d 785, 1985 Miss. LEXIS 2429 (Miss. 1985).

Claim by subcontractor against prime contractor based upon work for which no agreement has been made in advance as to price does not qualify as open account upon which attorney fees and prejudgment interest might be based. *Stanton & Associates, Inc. v. Bryant Constr. Co.*, 464 So. 2d 499, 1985 Miss. LEXIS 1916 (Miss. 1985).

Attorney fees were not recoverable under § 11-53-81, where an account was paid in full before trial and no judgment was ever rendered on the once-delinquent account. *Magnolia Farm Services, Inc. v. Tunica Oil Co.*, 438 So. 2d 285, 1983 Miss. LEXIS 2927 (Miss. 1983).

2. "Prevailing plaintiff."

Attorney was not entitled to the costs of collection under Miss. Code Ann. § 11-53-81 because the judgment was partially in favor of both parties, and the attorney

was not entitled to attorney's fees for collecting the debt. *Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert*, 991 So. 2d 1209, 2008 Miss. LEXIS 499 (Miss. 2008).

Award of attorney fees was not proper because both parties partially prevailed in the case. Thus, neither party was a "prevailing plaintiff" within the meaning of Miss. Code Ann. § 11-53-81. *Natchez Elec. & Supply Co. v. Johnson*, 968 So. 2d 444, 2006 Miss. App. LEXIS 118 (Miss. Ct. App. 2006), rev'd, 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

3. Counterclaims.

Where the defendant prevailed on the plaintiff's claims and where a judgment was rendered in favor of the defendant on its counterclaim for a debt on an open account after a demand for payment was made prior to filing its counterclaim, the defendant was the prevailing party and attorney fees were properly awarded. *Par Indus. v. Target Container Co.*, 708 So. 2d 44, 1998 Miss. LEXIS 41 (Miss. 1998).

4. Difference between demand letter and complaint.

Creditor complied with Miss. Code Ann. § 11-53-81, even though a different amount was stated in a demand letter and a complaint; although a strict construction of § 11-53-81 was required, there was nothing mandating that the same amount be stated in both, so long as the correct amount was set forth. This was in conformity with case law from Louisiana relating to La. Rev. Stat. Ann. § 9:2781, which was considered persuasive authority. *Gulf City Seafoods, Inc. v. Oriental Foods, Inc.*, 986 So. 2d 974, 2007 Miss. App. LEXIS 771 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 341 (Miss. 2008).

OPINIONS OF THE ATTORNEY GENERAL

Section 11-53-81 provides for reasonable attorneys fees to be awarded in the discretion of the judge. Also attorneys fees

may be provided for by contract. *Peterson*, October 11, 1996, A.G. Op. #96-0698.

RESEARCH REFERENCES

ALR.

Amount of attorneys' fees in matters involving commercial and general business activities. 58 A.L.R.3d 1327.

Factors or conditions in employment discrimination cases said to justify increase in attorney's fees awarded under § 706(k) of Civil Rights Act of 1964 (42 USCS § 2000e-5(k)). 140 A.L.R. Fed. 301.

Am. Jur.

1 Am. Jur. 2d (Rev), Accounts and Accounting §§ 8-20.

Complaint for balance due on open account, 1 Am. Jur. Pl & Pr Forms (Rev), Accounts and Accounting, Forms 21, 23, 25, 26.

Demand for payment of account, 1 Am. Jur. Legal Forms 2d, Accounts and Accounting § 6:13.

CJS.

1 C.J.S., Accounts, Actions on §§ 2-32.

Law Reviews.

1983 Mississippi Supreme Court Review: Attorneys' fee in suit on open account. 54 Miss L. J. 103, March, 1984.

Dunn, Construction Contract Claims and Litigation – Suits on Public Bonds and Suits on Private Bonds. 55 Miss. L. J. 431, September 1985.

CHAPTER 55.

LITIGATION ACCOUNTABILITY ACT OF 1988

Sec.

11-55-1.	Title.
11-55-3.	Definitions.
11-55-5.	Assessment of attorney fees and costs against attorney or party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings.
11-55-7.	Award of costs and attorney's fees; amount of award; factors to consider.
11-55-9.	Limitations of chapter.
11-55-11.	Application of chapter.
11-55-13.	Severability.
11-55-15.	Actions to which chapter applies.

§ 11-55-1. Title.

This chapter may be cited as the "Litigation Accountability Act of 1988."

HISTORY: Laws, 1988, ch. 495, § 1, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Paternity.
3. Wills.

1. In general.

Although defendant bore the burden of designating those parts of the record necessary for the appeal, defendant designated no transcript, and no testimony of the trial was made a part of the record. The record contained insufficient evidence to analyze defendant's argument the trial court should have granted his motion for sanctions. *Hampton v. Blackmon*, 145 So. 3d 632, 2014 Miss. LEXIS 309 (Miss. 2014).

Mississippi Supreme Court considered and ruled upon the issues of personal jurisdiction and sufficient service of process such that the Tennessee courts found that the Mississippi circuit court had subject matter jurisdiction to award appellee attorney's fees and expenses against the Tennessee attorney under Miss. Code Ann. § 11-55-1; the attorney's appeal was

barred under *res judicata* and the enrollment of the Mississippi judgment against the attorney was affirmed and the Mississippi judgments afforded full faith and credit in Tennessee. *First State Bank v. Wyssbrod*, 124 S.W.3d 566, 2003 Tenn. App. LEXIS 511 (Tenn. Ct. App. 2003).

Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 through 11-55-15 (2002), allows only a court, not an administrative board, to award attorneys' fees. *Miss. Empl. Sec. Comm'n v. Culbertson*, 832 So. 2d 519, 2002 Miss. LEXIS 409 (Miss. 2002).

State employer's failure to follow state personnel board rules regarding promotions entitled employees to promotions and back pay; but only the reviewing court, not the Employee Appeals Board, had the authority to award the employees their attorneys' fees. *Miss. Empl. Sec. Comm'n v. Culbertson*, 832 So. 2d 519, 2002 Miss. LEXIS 409 (Miss. 2002).

Grandson's claim that his uncle should be required to return the proceeds of three certificates of deposit his grandmother had obtained in her name and the uncle's

name, jointly, to the grandmother's estate, because of the uncle's undue influence over the grandmother, without offering any proof of a confidential relationship between the uncle and the grandmother, subjected the grandson, and his attorney, to the assessment of the uncle's attorney's fees and costs. *Foster v. Ross*, 804 So. 2d 1018, 2002 Miss. LEXIS 14 (Miss. 2002).

The adoption of Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, did not render void the Mississippi Litigation Accountability Act of 1988 (§§ 11-55-1 et seq.), which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment, since there is no apparent conflict between the plain language of the statutes and the rule. *Stevens v. Lake*, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

2. Paternity.

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litiga-

tion Accountability Act, Miss. Rev. Code § 11-55-1 et seq., because the father's claim for custody was not frivolous. He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. *Adcock v. Van Norman*, 918 So. 2d 747, 2005 Miss. App. LEXIS 208 (Miss. Ct. App.), *aff'd* in part and *rev'd* in part, 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

3. Wills.

Chancellor abused her discretion in failing to award sanctions because a stepson withheld the existence of a handwritten document stating, among other things, the testator's intention to revoke all prior wills, the stepson had no hope of rebutting the presumption that the will had been lost and not destroyed, the nondisclosure made his petition to probate a will frivolous, and the son incurred unnecessary expense in contesting the probate of the will. *Pannagl v. Lambert* (In re Estate of Pannagl), 166 So. 3d 39, 2014 Miss. App. LEXIS 627 (Miss. Ct. App. 2014), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 336 (Miss. 2015).

RESEARCH REFERENCES

ALR.

Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

When statute of limitations begins to run upon action against attorney for legal malpractice – deliberate wrongful acts or omissions. 67 A.L.R.5th 587.

Law Reviews.

Robertson, Discovering Rule 11 of the Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

§ 11-55-3. Definitions.

The following words and phrases as used in this chapter have the meaning ascribed to them in this section, unless the context clearly requires otherwise:

(a) "Without substantial justification," when used with reference to any action, claim, defense or appeal, including without limitation any motion, means that it is frivolous, groundless in fact or in law, or vexatious, as determined by the court.

(b) "Person" means any individual, corporation, company, association, firm, partnership, society, joint stock company or any other entity, including any governmental entity or unincorporated association of persons.

(c) “Action” means a civil action that contains one or more claims for relief, defense or an appeal of such civil action. For the purposes of this chapter only, an “action” also means any separate count, claim, defense or request for relief contained in any such civil action.

HISTORY: Laws, 1988, ch. 495, § 2, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. “Frivolous.”

1. In general.

Judge did not abuse her discretion in sanctioning an attorney and his client because a standing order merely implemented Miss. Unif. Ch. Ct. R. 1.06(C), which authorized the opponent’s Miss. R. Civ. P 81(d) summons; thus, the attorney’s motion to quash and request for sanctions against the opponent had no hope for success. *Garner v. Smith*, — So. 3d —, 2019 Miss. LEXIS 241 (Miss. June 27, 2019).

Evidence supported the chancellor’s findings that the claims concerning the dissemination of the daughter’s medical records and custody claims were without substantial justification; therefore, the attorney was liable for sanctions under the Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq. *In re Spencer*, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss.), cert. denied, 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600 (U.S. 2008).

Where a party in a divorce proceeding had substantial justification in presenting a motion for modification, the chancellor erred in imposing sanctions upon his attorney. *Norton v. Norton*, 742 So. 2d 126, 1999 Miss. LEXIS 188 (Miss. 1999).

A chancellor erred in assessing sanctions against a plaintiff and his attorney based upon a finding that they had brought their action for trespass to real property “without substantial justification” since it could not be said that they had “no hope of success,” even though the

action was effectively barred by a judgment in a separate action declaring the plaintiff to have no legally cognizable interest in the subject property, where the plaintiff and his attorney had “hope,” which proved to be well-founded, that the Supreme Court would remove the bar by reversing the prior judgment, the plaintiff’s claim was clearly not “groundless in fact or in law” as he would be entitled to prevail if the allegations in his complaint were proven, and there was no allegation that the action was filed for purposes of vexation. *Smith v. Malouf*, 597 So. 2d 1299, 1992 Miss. LEXIS 216 (Miss. 1992).

2. “Frivolous.”

Under Miss. Code Ann. § 11-55-7(a)-(b), although a former professor had no hope of success on his negligence-based claims against university staff who were immune under Miss. Code Ann. § 11-46-7(2), they were not entitled to fees incurred defending against those claims after the professor conceded them in his responses to summary judgment motions. *Payne v. Univ. of S. Miss.*, — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 73028 (S.D. Miss. June 5, 2015), *aff’d*, 681 Fed. Appx. 384, 2017 U.S. App. LEXIS 4495 (5th Cir. Miss. 2017).

Chancellor did not abuse his discretion in finding that a pipeline services company had acted in bad faith by attaching an irrelevant purchase order, which had not been signed by a vendor, to its complaint as the basis for a preliminary injunction. Moreover, the chancellor found that, based on the complaint as pleaded by the company, it was apparent that the company was not entitled to the relief it requested, an injunction, as its applica-

tion for a preliminary injunction was frivolous. *Expro Ams., LLC v. Walters*, 179 So. 3d 1010, 2015 Miss. LEXIS 574 (Miss. 2015).

Circuit court abused its discretion in awarding sanctions based on a daughter's untimely filing because the daughter's attempt to avoid dismissal by asserting the discovery rule was not sanctionable under the Mississippi Litigation Accountability Act; because the application of the discovery rule was a fact-intensive process, the daughter's discovery-rule argument, objectively speaking, was not frivolous. *Waldrup v. Eads*, 180 So. 3d 820, 2015 Miss. App. LEXIS 635 (Miss. Ct. App. 2015).

Quiet title action based on adverse possession was a frivolous suit because plaintiff and his counsel knew before filing suit that no patent had been issued by the United States releasing the particular parcel from the public domain and that based on the language of 28 U.S.C.S. § 2409a, suit could not be brought against the United States under an adverse possession theory. *Sullivan v. Maddox*, 122 So. 3d 75, 2013 Miss. App. LEXIS 26 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 453 (Miss. 2013).

Former wife should not have been ordered to pay attorneys' fees in an alienation of affection case because the claim was not frivolous, groundless in fact or in law, or vexatious where there was personal jurisdiction over the claim in Mississippi; moreover, the court could not have concluded that the claim had no hope of success since it fell within the long-arm statute. *Miller v. Provident Adver. & Mktg.*, 155 So. 3d 181, 2014 Miss. App. LEXIS 339 (Miss. Ct. App. 2014), cert. denied, — So. 3d —, 2015 Miss. LEXIS 21 (Miss. 2015), cert. denied, 154 So. 3d 33, 2015 Miss. LEXIS 29 (Miss. 2015), cert. denied, — So. 3d —, 2015 Miss. LEXIS 34 (Miss. 2015), cert. denied, — So. 3d —, 2015 Miss. LEXIS 32 (Miss. 2015), cert. denied, — U.S. —, 135 S. Ct. 2862, 192 L. Ed. 2d 897, 2015 U.S. LEXIS 4230 (U.S. 2015).

Father's appeal of a chancellor's denial of the father's recusal motion was frivolous and thus without substantial justification because the chancellor had recused

himself long before the appeal, and the father was aware of the recusal. *Balius v. Gaines*, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

Chancellor's decision not to award attorney's fees to the landowner was not an abuse of discretion where there was no evidence that the county filed the title claim in bad faith or without justification; to the contrary, the county presented ample evidence to support its claim. *Knight v. Covington County*, 27 So. 3d 1163, 2009 Miss. App. LEXIS 216 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 76 (Miss. Feb. 18, 2010).

Because a father was aware of a son's statute of limitation's defense and the father proceeded with his action on a promissory note even though he had no hope of success, a trial court did not abuse its discretion in determining that the suit was frivolous and without substantial justification under Miss. Code Ann. §§ 11-55-5(1) and 11-55-3(a). Accordingly, the trial court could impose sanctions in the form of attorneys' fees and expenses against the father. *Merideth v. Merideth*, 987 So. 2d 477, 2008 Miss. App. LEXIS 393 (Miss. Ct. App. 2008).

Sanctions against plaintiffs were not warranted where, based on the background of the case and including its long history of transfers and the period of time allowed by the multi-district court for discovery, plaintiffs did not delay the litigation for the purpose of harassment; the grounds for the dismissal of claims were based on a recent clarification of the law in Mississippi regarding joinder pursuant to Miss. R. Civ. P. 20. *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove*, 965 So. 2d 1041, 2007 Miss. LEXIS 557 (Miss. 2007).

Where a chancery court had already issued an order regarding the disposition of insurance funds, a subsequent lawsuit over the same issue involving the same parties was barred by the doctrine of collateral estoppel; since a subsequent claim arising from the same issue had no hope of success, sanctions were properly awarded. *Richardson v. Audubon Ins. Co.*, 948 So. 2d 445, 2006 Miss. App. LEXIS 712 (Miss. Ct. App. 2006).

Appellate court affirmed a grant of summary judgment in favor of defendants as

plaintiff had admitted it had no contract with a group of property owners to auction their property, but defendants' request for attorney fees under Miss. Code Ann. § 11-55-5(1) was denied as the court could not state that plaintiff's claim was substantially without justification as defined by Miss. Code Ann. § 11-55-3. *John Mazingo Real Estate & Auction, Inc. v. Nat'l Auction Group, Inc.*, 925 So. 2d 141, 2006 Miss. App. LEXIS 201 (Miss. Ct. App. 2006).

Refusal to award attorney's fees to the mother in a child custody action was

proper pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., because the father's claim for custody was not frivolous pursuant to Miss. Rev. Code §§ 11-55-5(1) and 11-55-3(a). He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. *Adcock v. Van Norman*, 918 So. 2d 747, 2005 Miss. App. LEXIS 208 (Miss. Ct. App.), *aff'd in part and rev'd in part*, 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

RESEARCH REFERENCES

ALR.

Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution. 87 A.L.R.3d 554.

Civil liability of attorney for abuse of process. 97 A.L.R.3d 688.

Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

§ 11-55-5. Assessment of attorney fees and costs against attorney or party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings.

(1) Except as otherwise provided in this chapter, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.

(2) No attorney's fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense within a reasonable time after the attorney or party filing the action, claim or defense knows or reasonably should have known that it would not prevail on the action, claim or defense.

(3) When a court determines reasonable attorney's fees or costs should be assessed, it shall assess the payment against the offending attorneys or parties, or both, and in its discretion may allocate the payment among them, as it determines most just, and may assess the full amount or any portion to any offending attorney or party.

(4) No party, except an attorney licensed to practice law in this state, who is appearing without an attorney shall be assessed attorney's fees unless the court finds that the party clearly knew or reasonably should have known that

such party's action, claim or defense or any part of it was without substantial justification.

HISTORY: Laws, 1988, ch. 495, § 3, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Attorneys' fees awarded excessive.
3. Payment of attorneys' fees awarded.
4. Attorneys' fees awarded not excessive.
5. Payment of attorneys' fees denied.

1. In general.

Because the circuit court failed to make any of the required findings as to the appropriateness of an award of attorney's fees, the circuit court abused its discretion. *Wirtz v. Adams Cty. Bd. of Supervisors*, — So. 3d —, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. Apr. 16, 2019).

Judge did not abuse her discretion in sanctioning an attorney and his client because a standing order merely implemented Miss. Unif. Ch. Ct. R. 1.06(C), which authorized the opponent's Miss. R. Civ. P 81(d) summons; thus, the attorney's motion to quash and request for sanctions against the opponent had no hope for success. *Garner v. Smith*, — So. 3d —, 2019 Miss. LEXIS 241 (Miss. June 27, 2019).

It was error to award a town and school district attorney's fees because the court did not consider required statutory factors. *Tunica County v. Town of Tunica*, 227 So. 3d 1007, 2017 Miss. LEXIS 179 (Miss. 2017).

"Judgment for Defendant" contained in the record was a sufficient final judgment for appellate review of the trial court's award of attorney's fees and expenses to a patient under the Litigation Accountability Act because although a separate order granting the doctor's voluntary dismissal did not appear in the appellate record, the "Judgment for Defendant" was clearly predicated upon such a dismissal. *Monaghan v. Autry*, 229 So. 3d 201, 2017 Miss. App. LEXIS 155 (Miss. Ct. App. 2017).

Mortgage company owed appellee association dues, and appellant owed the company rent, and he agreed to pay the dues in lieu of some of his rent; appellant lived in the condominium and enjoyed the services provided by appellee, but neither appellant nor the mortgage company paid the association dues, and appellee's claim to be a third-party beneficiary was hardly frivolous for sanction purposes. *Russell v. Beachwalk Condominums Ass'n*, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Trial court specifically addressed and rejected appellant's requests for sanctions on the merits of his claims, and there was no merit to his argument that the trial court employed the wrong legal standard in denying sanctions. *Russell v. Beachwalk Condominums Ass'n*, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Any failure of the trial court to specifically address potential sanctions claims stemmed from the lack of specificity in appellant's motion, which lacked a clear statement of the issues presented; the trial court addressed the contentions that were presented in detail, and the court would not hold the trial court in error for other matters not properly presented by appellant. *Russell v. Beachwalk Condominums Ass'n*, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Appellant argued that appellee lacked authority or standing to sue, but these arguments were all premised on the unsupported assertion that appellant was a lawful tenant when appellee filed suit; there was some evidence in the record suggesting the potential for a factual dispute, and the denial of sanctions was proper. *Russell v. Beachwalk Condominums Ass'n*, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Trial court did not err in not considering all of appellant's claims for sanctions on their own individual merits because appellant's contentions were not distinctly identified in the statement of issues or separately and distinctly argued and were therefore procedurally barred. *Russell v. Beachwalk Condominiums Ass'n*, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Circuit court abused its discretion in awarding sanctions based on a daughter's untimely filing because the daughter's attempt to avoid dismissal by asserting the discovery rule was not sanctionable under the Mississippi Litigation Accountability Act; because the application of the discovery rule was a fact-intensive process, the daughter's discovery-rule argument, objectively speaking, was not frivolous. *Waldrup v. Eads*, 180 So. 3d 820, 2015 Miss. App. LEXIS 635 (Miss. Ct. App. 2015).

Chancery court did not abuse its discretion in denying a husband's motion to alter or amend the award of sanctions because the husband's motion for recusal was without substantial justification; sanctions were awarded because the husband admitted that allegations in his first motion to recuse and attached affidavit were false or beyond his knowledge. *Boatwright v. Boatwright*, 184 So. 3d 952, 2015 Miss. App. LEXIS 351 (Miss. Ct. App. 2015), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 72 (Miss. 2016), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 73 (Miss. 2016), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 74 (Miss. 2016).

In conformity with the plain meaning of the Mississippi Litigation Accountability Act, the imposition of attorney's fees as sanctions for frivolous removal is within the powers of Mississippi courts; federal court does not provide the exclusive remedy for attorney's fees incurred as a result of frivolous removals. *Ashley Healthcare Plan v. Dillard (In re O.D.)*, 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Statute contains no express language which prohibits a judge's imposition of attorney's fees for frivolous removals to federal court; insofar as a party must file a notice of removal in state court in order to remove the case to federal court, and

assuming the removal to have been frivolous, this would fall squarely within the parameters of the statute. *Ashley Healthcare Plan v. Dillard (In re O.D.)*, 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Husband's claim that the chancery court should have sanctioned his wife under the Litigation Accountability Act was procedurally barred because the husband never raised it before the chancery court. *Pierce v. Pierce*, 132 So. 3d 553, 2014 Miss. LEXIS 122 (Miss. 2014).

Trial court did not err in ordering sanctions in a citizen's action against a city, a municipal court, and a municipal court judge pursuant to the Mississippi Litigation Accountability Act and Miss. R. Civ. P. 11(b) because the record clearly supported a finding that the citizen pursued a frivolous collateral action in trial court and that the sanctions were appropriate; in granting sanctions of attorney fees against the citizen pursuant to the factors set out in the Litigation Accountability Act, Miss. Code Ann. § 11-55-7, and Rule 11(b), the trial court found that the action was a frivolous action filed without substantial notification in order to harass the city, municipal court, and municipal court judge. *Prewitt v. City of Oxford*, 44 So. 3d 922, 2010 Miss. LEXIS 184 (Miss. 2010), cert. denied, 2010 Miss. LEXIS 274 (Miss. June 3, 2010), cert. denied, 562 U.S. 893, 131 S. Ct. 294, 178 L. Ed. 2d 142, 2010 U.S. LEXIS 6224 (U.S. 2010).

Violations under the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) had to be brought in motion form; thus, the Legislature did not create a separate cause of action by virtue of Miss. R. Civ. P. 11, and the doctor's claim against the attorney was properly dismissed; the attorney did not act in manner that was improper or would warrant sanctions. *Rose v. Tullos*, 994 So. 2d 734, 2008 Miss. LEXIS 573 (Miss. 2008).

Chancellor committed plain error and therefore abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record; there was nothing in the Litigation Accountability Act (Act) or Miss. R. Civ. P. 11 which supported awarding attorneys' fees and expenses in excess of those actually incurred as both the Act and the Rule

allowed only for the recovery of "reasonable" fees and costs; the punitive functions of both the Act and the Rule were served by simply awarding reasonable attorneys' fees and costs, not an amount in excess of them. In *re* Spencer, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008).

Sanctions against plaintiffs were not warranted where, based on the background of the case and including its long history of transfers and the period of time allowed by the multi-district court for discovery, plaintiffs did not delay the litigation for the purpose of harassment; the grounds for the dismissal of claims were based on a recent clarification of the law in Mississippi regarding joinder pursuant to Miss. R. Civ. P. 20. *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis & Dove*, 965 So. 2d 1041, 2007 Miss. LEXIS 557 (Miss. 2007).

Trial court had the authority to award the employees attorney fees pursuant to the Litigation Accountability Act of 1988 after they established that the State personnel agency passed them over for promotions they would have received had the State personnel followed its manual of policies, procedures, and rules in awarding promotions and not engaged in favoritism or bias in filling its own employment openings. *Miss. Empl. Sec. Comm'n v. Culbertson*, 2002 Miss. LEXIS 48 (Miss. Feb. 21, 2002), op. withdrawn, sub. op., 2002 Miss. LEXIS 428 (Miss. Dec. 12, 2002).

Trial court improperly awarded sanctions against the Mississippi Department of Human Services in a suit that sought to establish that a divorce decree that did not include a child support award was either void or insufficiently supported; neither argument was necessarily frivolous, and the trial court failed to set forth its reasons for awarding sanctions. *Miss. Dep't of Human Servs. v. Shelby*, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), op. withdrawn, sub. op., 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Although third trial resulted in directed verdict for insured, there was no evidence that insurer had prolonged the proceedings, as required to support insured's claim for attorney fees; insurer won both times that case was submitted to jury. *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171, 1997 Miss. LEXIS 303 (Miss. 1997).

In determining whether claim is frivolous for purposes of Litigation Accountability Act, warranting award of attorney fees, court looks to definition of "frivolous" found in *Miss. R. Civ. P. 11. Scruggs v. Saterfiel*, 693 So. 2d 924, 1997 Miss. LEXIS 166 (Miss. 1997).

In reviewing decision regarding the imposition of sanctions pursuant to Litigation Accountability Act, appellate court is limited to consideration of whether trial court abused its discretion. *Scruggs v. Saterfiel*, 693 So. 2d 924, 1997 Miss. LEXIS 166 (Miss. 1997).

Unsuccessful action in which child and aunt acting as child's guardian sought to obtain visitation with child's half brother, who was living with his father, was not frivolous for purposes of Litigation Accountability Act, and thus did not warrant attorney fee award; objectively speaking, it could not be said that motion, which concerned issue of first impression in state, was without hope of success. *Scruggs v. Saterfiel*, 693 So. 2d 924, 1997 Miss. LEXIS 166 (Miss. 1997).

In buyer's breach of contract action, in which contract itself did not provide for recovery of attorney fees, trial court was justified in refusing to require seller to pay buyer's attorney fees under Litigation Accountability Act; seller mounted articulate, cogent defense as to whether it was liable for cost of cover, and seller had already been required to pay buyer attorney fees incurred in bankruptcy proceeding in which seller sought to forestall instant litigation. *Terex Corp. v. Ingalls Shipbuilding*, 671 So. 2d 1316, 1996 Miss. LEXIS 129 (Miss. 1996).

An award of attorney's fees and costs against a will contestant pursuant to Rule 11, Miss. R. Civ. P. and the Litigation Accountability Act would be reversed where there was a presumption of undue influence by the testator's daughter and suspicious circumstances surrounding the execution of the will, which justified the filing of the complaint and gave the contestant some "hope of success." *Pallatin v. Jones (In re Will of Fankboner)*, 638 So. 2d 493, 1994 Miss. LEXIS 314 (Miss. 1994).

The adoption of Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is

frivolous or was filed for the purpose of harassment or delay, did not render void the Mississippi Litigation Accountability Act of 1988 (§§ 11-55-1 et seq.), which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment, since there is no apparent conflict between the plain language of the statutes and the rule. *Stevens v. Lake*, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

By stating that the court shall specifically set forth the reasons for awarding attorney's fees and costs and enumerating factors to be considered by the court when making such an award, § 11-55-7 augments Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, and § 11-55-5, which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment. *Stevens v. Lake*, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

A petitioner's action for a writ of mandamus compelling a county board of education to adopt a resolution requesting the board of supervisors to create single member districts was not without substantial justification, and therefore the trial court did not err in declining to award attorney's fees to the school board under the Litigation Accountability Act (§§ 11-55-1 et seq.), even though the petitioner did not make an effort to dismiss the action when he learned that his claim was moot though the board of education suggested that he do so, where there was no evidence that the action was prosecuted in bad faith or for an improper purpose, there were no issues of fact determinative of the validity of the claim in conflict at the time of the first hearing, and there was no prevailing party since the petitioner's claim became moot via action of the school board following the first hearing. *Jackson County School Bd. v. Osborn*, 605 So. 2d 731, 1992 Miss. LEXIS 313 (Miss. 1992).

A chancellor erred in assessing sanctions against a plaintiff and his attorney

based upon a finding that they had brought their action for trespass to real property "without substantial justification" since it could not be said that they had "no hope of success," even though the action was effectively barred by a judgment in a separate action declaring the plaintiff to have no legally cognizable interest in the subject property, where the plaintiff and his attorney had "hope," which proved to be well-founded, that the Supreme Court would remove the bar by reversing the prior judgment, the plaintiff's claim was clearly not "groundless in fact or in law" as he would be entitled to prevail if the allegations in his complaint were proven, and there was no allegation that the action was filed for purposes of vexation. *Smith v. Malouf*, 597 So. 2d 1299, 1992 Miss. LEXIS 216 (Miss. 1992).

2. Attorneys' fees awarded excessive.

Under Miss. Code Ann. § 11-55-7(a)-(b), although a former professor had no hope of success on his negligence-based claims against university staff who were immune under Miss. Code Ann. § 11-46-7(2), they were not entitled to fees incurred defending against those claims after the professor conceded them in his responses to summary judgment motions. *Payne v. Univ. of S. Miss.*, — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 73028 (S.D. Miss. June 5, 2015), *aff'd*, 681 Fed. Appx. 384, 2017 U.S. App. LEXIS 4495 (5th Cir. Miss. 2017).

Chancellor abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record as there was nothing in the Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 et seq., or Miss. R. Civ. P. 11 which supported awarding attorneys' fees and expenses in excess of those actually incurred. *In re Spencer*, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss.), *cert. denied*, 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600 (U.S. 2008).

3. Payment of attorneys' fees awarded.

Trial court did not err in awarding attorney's fees and expenses to a patient pursuant to the Litigation Accountability

Act because the patient had to incur unnecessary expenses in a doctor's action seeking payment for medical services; prior to the lawsuit, the patient advised the doctor's office they were attempting to collect payment from the wrong person, but the doctor still served the patient with the summons and complaint. *Monaghan v. Autry*, 229 So. 3d 201, 2017 Miss. App. LEXIS 155 (Miss. Ct. App. 2017).

Special court of eminent domain erred in denying an owner's request for attorney's fees and expenses because the neighbors clearly invoked the statutory procedures of the special court of eminent domain when they petitioned to condemn the owner's property for a private road and the state constitution clearly prohibited the Legislature from creating the statutory right to condemn for a private road property within an incorporated city or town. *High v. Kuhn*, 240 So. 3d 1198, 2017 Miss. LEXIS 455 (Miss. 2017).

Chancery court properly found that a tenant filed a *lis pendens* (a "Notice of Subordination, Attornment and Non-Disturbance Agreement with a "rental agreement" attached) without substantial justification and awarded fees and costs to the owner because the tenant never had a valid rental agreement inasmuch as the agreement was between the tenant and her father and uncle, and the property was owned by her cousin and later sold to the current owner when the document was prepared and filed, and the tenant's denial of the allegation to remove the notice from the county records had no justification whatsoever. *Huey v. Strong*, 206 So. 3d 547, 2016 Miss. App. LEXIS 795 (Miss. Ct. App. 2016).

Chancery court properly awarded attorney's fees to a buyer because, although the chancellor did not expressly identify the legal basis of the award, it was clear from context that the fees were awarded pursuant to the Litigation Accountability Act, there was substantial evidence to support the chancellor's findings that the various legal maneuvers pursued by the seller in seeking to avoid its clear obligation to reimburse the buyer were frivolous and calculated to delay and harass the buyer and that the seller's attempt to have the buyer's utilities disconnected was espe-

cially egregious in nature. *Main St. Holding v. Omsiv Inc.*, 203 So. 3d 668, 2016 Miss. App. LEXIS 711 (Miss. Ct. App. 2016).

Vendor and a former employee of a company in the pipeline services business were entitled to an award of attorneys' fees and expenses because the company filed its application for a preliminary injunction against them frivolously and in bad faith, regardless of the amount of the injunction bond posted by the company. *Expro Ams., LLC v. Walters*, 179 So. 3d 1010, 2015 Miss. LEXIS 574 (Miss. 2015).

Chancery court properly awarded an insured attorney's fees because it did not abuse its discretion in determining that an insured's removal to federal court was unsubstantiated and contrary to well-established precedent; there was clearly established precedent that the Employment Retirement Income Security Act of 1974 did not preempt a chancery court's power to settle the claims of minors. *Ashley Healthcare Plan v. Dillard (In re O.D.)*, 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Chancery court did not err in awarding an insured attorney's fees on the ground that an insurer's removal to federal court was contrary to clearly established law and was done for the purpose of delaying litigation because the insurer sought a remedy in federal court that did not exist under the Enforcement Provision of the Employment Retirement Income Security Act of 1974; by removing the case to federal court, the insurer failed to state a claim that was cognizable under federal law. *Ashley Healthcare Plan v. Dillard (In re O.D.)*, 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Chancery court did not abuse its discretion in awarding an insured attorney's fees on the ground that an insurer's removal of the case to federal court was frivolous because the award was inextricably intertwined with its determination that it was clearly established that the chancery court's statutory duty to approve the settlement of the insured's liability insurance claims was not preempted by the Employment Retirement Income Security Act of 1974. *Ashley Healthcare Plan v. Dillard (In re O.D.)*, 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Chancery court did not err in awarding an insured attorney's fees on the ground that an insurer's removal to federal court was contrary to clearly established law and was done for the purpose of delaying litigation because frivolous removals to federal court were subject to the Mississippi Litigation Accountability Act; the insurer's removal suspended the chancery court's jurisdiction for two years, preventing it approval of the settlements of an insured's claims. *Ashley Healthcare Plan v. Dillard* (In re O.D.), 177 So. 3d 175, 2015 Miss. LEXIS 390 (Miss. 2015).

Trial court did not abuse its discretion in awarding attorneys fee sanction against plaintiff and his counsel in a quiet title action because the record established that both plaintiff and his counsel were fully aware of the fact that the quiet title claim, based on adverse possession and regarding a parcel that was held by the United States, could not be successful under 28 U.S.C.S. § 2409a. *Sullivan v. Maddox*, 122 So. 3d 75, 2013 Miss. App. LEXIS 26 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 453 (Miss. 2013).

As appellant failed to serve a complaint on an estate and his claim against the estate was time barred, the trial court did not abuse its discretion in awarding the estate attorneys' fees under Miss. Code Ann. § 11-55-5(1). *Covington v. McDaniel* (In re Estate of Necaize), 126 So. 3d 49, 2013 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

Attorney's fees were awarded in favor of and against the father in a custody proceeding even though the father was proceeding pro se in an appeal of a chancellor's denial of the father's recusal motion. The appeal was without substantial justification because the chancellor had recused himself long before the appeal, and the father was aware of the recusal. *Balius v. Gaines*, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

Decision to impose sanctions under Miss. R. Civ. P. 45(f) and Miss. Code Ann. § 11-55-5(1), including an award of attor-

ney's fees, against creditors was consistent with the decision that the garnishment was unreasonable as a result of the considerable evidence that creditors knew or should have known prior to filing for garnishment of the good efforts debtors made with regard to making the payment at issue. *Deliman v. Anthony Clarke Thomas & Act Envtl., Inc.*, 16 So. 3d 721, 2009 Miss. App. LEXIS 79 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 415 (Miss. 2009).

Where plaintiff's counsel commenced a personal injury suit against defendant railroad company one year and eight months after plaintiff's demise, the lawsuit amounted to a nullity; because the railroad company had a complete defense based upon the death of plaintiff some 20 months earlier, the lawsuit was frivolous, and an award of attorney fees was proper under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5. *Ill. Cent. R.R. Co. v. Broussard*, 2008 Miss. App. LEXIS 589 (Miss. Ct. App. Sept. 30, 2008).

Because a father was aware of a son's statute of limitation's defense and the father proceeded with his action on a promissory note even though he had no hope of success, a trial court did not abuse its discretion in determining that the suit was frivolous and without substantial justification under Miss. Code Ann. §§ 11-55-5(1) and 11-55-3(a). Accordingly, the trial court could impose sanctions in the form of attorneys' fees and expenses against the father. *Merideth v. Merideth*, 987 So. 2d 477, 2008 Miss. App. LEXIS 393 (Miss. Ct. App. 2008).

Evidence supported the chancellor's findings that the claims concerning the dissemination of the daughter's medical records and custody claims were without substantial justification; therefore, the attorney was liable for sanctions under the Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 et seq. *In re Spencer*, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss.), cert. denied, 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600 (U.S. 2008).

Award of attorneys' fees based upon a quantum meruit claim in favor of the subcontractor was proper because the contractor delayed paying the subcontractor

the remaining balance on its contract for no apparent reason. The contractor knew that the subcontractor was entitled to the money, but withheld the money and continued to do so; further, the contractor solicited and secured the subcontractor's efforts to persuade the agency to release the retainage, inducing the subcontractor to believe that it would get its money when in fact the contractor had already assigned the entire retainage to its bank. *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 2007 Miss. LEXIS 577 (Miss. 2007).

Where a chancery court had already issued an order regarding the disposition of insurance funds, a subsequent lawsuit over the same issue involving the same parties was barred by the doctrine of collateral estoppel; since a subsequent claim arising from the same issue had no hope of success, sanctions were properly awarded. *Richardson v. Audubon Ins. Co.*, 948 So. 2d 445, 2006 Miss. App. LEXIS 712 (Miss. Ct. App. 2006).

Executor's misrepresentation of the true facts to the chancery court (his brother's known claims of ownership to the livestock and the evidence of a valid inter vivos gift by the decedent), amounted to "improper conduct" under Miss. Code Ann. § 91-7-85, and his removal as executor of the estate was proper. Further, the chancellor properly found that the executor (and his attorney), violated the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 to 11-55-15 (Rev. 2002), and Miss. R. Civ. P. 11(b), by their misrepresentations in obtaining an order from the chancery court, permitting them to retrieve the subject livestock, and the chancellor's award of attorney's fees and expenses was proper. *In re Estate of Ladner v. Ladner*, 909 So. 2d 1051, 2004 Miss. LEXIS 1356 (Miss. 2004) (Miss. – 2004).

Attorney fees were properly awarded against a pro se litigant in an action by him against a judge where the judge's attorney wrote to him advising that his cause of action lacked merit, advising him of the Litigation Accountability Act of 1988, requesting that he seek legal counsel, and stating that, if he pursued the complaint, an award of attorney's fees would be sought. *Wheeler v. Stewart*, 798

So. 2d 386, 2001 Miss. LEXIS 42 (Miss. 2001).

Sanctions were properly awarded to the defendant in an action for intentional infliction of emotional distress based on an allegation that the plaintiff's former wife set out on a course of conduct calculated to lead to the total destruction of the parent-child/grandparent-child relationship between the parties' child and her father's side of the family where the trial court found that the plaintiffs had no hope of success in the case. *Little v. Collier*, 759 So. 2d 454, 2000 Miss. App. LEXIS 103 (Miss. Ct. App. 2000).

The plaintiff's attorney was properly ordered to pay attorneys' fees to the defendant since (1) he had every opportunity to research and insure that the claim had a hope of survival and chose to file the suit and to pursue it even after he learned of prior proceedings that showed no hope of success, and (2) even if he filed the suit with a hope of success, once he learned of those prior proceedings, he should have voluntarily dismissed the suit. *McBride v. Meridian Pub. Improvement Corp.*, 730 So. 2d 548, 1998 Miss. LEXIS 550 (Miss. 1998).

4. Attorneys' fees awarded not excessive.

Chancellor did not err in denying a husband's request for sanctions and attorney's fees for defending the wife's attacks on the validity of the prenuptial agreement where, in light of the unavailability of the original prenuptial agreement, the wife's attacks on the validity of the photocopied duplicates were neither frivolous nor without substantial justification. *Black v. Black*, 240 So. 3d 1226, 2017 Miss. App. LEXIS 629 (Miss. Ct. App. 2017).

Owner was properly awarded attorneys fees and costs of \$32,837.06 for slander of title where a law firm filed lis pendens notices claiming that the land the transportation commission was seeking to condemn was of interest in a Louisiana action, when in fact the land had nothing to do with the Louisiana action and the same parties were not involved; the firm stipulated that the \$200 per hour rate was reasonable. *Lehman v. Miss. Transp.*

Comm'n, 127 So. 3d 277, 2013 Miss. App. LEXIS 363 (Miss. Ct. App.), cert. denied, 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

Amount of attorneys' fees awarded in favor of the subcontractor were not excessive because the facts surrounding and concerning that portion of the subcontractor's motion for attorneys' fees relating to setting the amount of attorney's fees justified the assessment of the fees in an amount that the trial judge found to have been reasonable and fair and that satisfied the requirements of law. The trial judge presided over a two-week trial in which numerous witnesses testified and more than 100 exhibits were received into evidence. *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 2007 Miss. LEXIS 577 (Miss. 2007).

5. Payment of attorneys' fees denied.

Decedent's wife was not entitled to attorney's fees and expenses on appeal because in asserting her claim to attorney's fees and expenses, the wife failed to cite any relevant statutory law, caselaw, or rules; because the decedent's daughter asserted a nonfrivolous issue on appeal, and because the wife failed to cite relevant authority to support her claim, her request for attorney's fees and expenses on appeal was denied. *Chester v. Labasse* (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70, 2018 Miss. LEXIS 192 (Miss. 2018).

Circuit court did not err by failing to sanction a boat insurer for making a frivolous claim for defense costs and expenses where although the cases it cited in support of its position were distinguishable, its position was neither frivolous nor interposed for delay or harassment. *Cont'l Cas. Co. v. Allstate Prop. & Cas. Ins. Co.*, 235 So. 3d 40, 2017 Miss. LEXIS 340 (Miss. 2017).

In an easement dispute, it was not error to deny the dominant estate holder's request for attorney's fees because (1) the servient estate holders acted in good faith, (2) no contractual provision or statute authorized an award, and (3) no monetary damages were shown. *McDowell v. Zion Baptist Church*, 203 So. 3d 676, 2016

Miss. App. LEXIS 703 (Miss. Ct. App. 2016).

Chancery court erred in finding that the Department of Marine Resources (DMR) violated the Mississippi Litigation Accountability Act because DMR was under no duty to join the State Auditor as a necessary party. *Miss. Dep't of Audit v. Gulf Publ. Co.*, 235 So. 3d 1452, 2016 Miss. App. LEXIS 170 (Miss. Ct. App. 2016), rev'd, in part, vacated, 236 So. 3d 32, 2017 Miss. LEXIS 437 (Miss. 2017).

Chancery court erred in finding that the Department of Marine Resources (DMR) violated the Mississippi Litigation Accountability Act because although the chancery court found that DMR was under an affirmative duty to maintain a back up copy of the complete set of records it was charged to keep as a public body, nothing in Miss. Code Ann. § 25-59-15 required every public record to be backed up with paper or electronic copies. *Miss. Dep't of Audit v. Gulf Publ. Co.*, 235 So. 3d 1452, 2016 Miss. App. LEXIS 170 (Miss. Ct. App. 2016), rev'd, in part, vacated, 236 So. 3d 32, 2017 Miss. LEXIS 437 (Miss. 2017).

Sanctions were inappropriate because a husband's pleading was not frivolous; it was possible that the husband's petition could have been granted, and his intentions in filing the pleading were irrelevant because the pleading itself was capable of succeeding. *Huseth v. Huseth*, 135 So. 3d 846, 2014 Miss. LEXIS 196 (Miss. 2014).

Chancery court did not err in failing to sanction a wife under the Litigation Accountability Act because the wife did not withhold the information from the chancery court, and the information was before the chancery court when it made the original attorney's fees award as well as the attorney's fees award on remand. *Pierce v. Pierce*, 132 So. 3d 553, 2014 Miss. LEXIS 122 (Miss. 2014).

Doctor's motion for sanctions under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5 against a patient's attorney in a wrongful death action that alleged medical malpractice was properly denied as the attorney had a reasonable hope of success and had performed due diligence in determining the validity of the claim against the doctor. *Todd v. Clayton*, 53 So. 3d 827,

2011 Miss. App. LEXIS 51 (Miss. Ct. App. 2011).

Refusal to award attorney fees to the employer after the deceased employee's personal-injury suit was dismissed was proper under Miss. R. Civ. P. 11 and the Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 to 11-55-15, because, although the filing of a claim for a deceased person was frivolous since the claim had no hope of success, the decision to award sanctions was within the discretion of the trial court and the trial court was within its discretion to deny sanctions. The deceased employee's counsel filed the lawsuit and tried to follow up on it, and the employee was alive when it was originally filed; when counsel was unable to contact the employee, counsel pursued the lawsuit on the employee's behalf in order to avoid being barred by the statute of limitations. *Ill. Cent. R.R. v. Broussard*, 19 So. 3d 821, 2009 Miss. App. LEXIS 745 (Miss. Ct. App. 2009).

Appellate court could not find that the chancery court erred in concluding that sanctions under neither Miss. R. Civ. P. 11(b) nor the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) were warranted because while the chancellor had ordered the property owner to pay the county's fees for producing the records, it was unclear whether the property owner was to pay the bill within 20 days of the hearing or the final judgment. However, once the property owner paid the fees and the county withdrew its motion, the issue became moot. *LaCroix v. Marshall County Bd. of Supervisors*, 28 So. 3d 650, 2009 Miss. App. LEXIS 537 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

Chancellor's decision not to award attorney's fees to the landowner was not an abuse of discretion where there was no evidence that the county filed the title claim in bad faith or without justification; to the contrary, the county presented ample evidence to support its claim. *Knight v. Covington County*, 27 So. 3d 1163, 2009 Miss. App. LEXIS 216 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 76 (Miss. Feb. 18, 2010).

In a will-contest action, even if the matter were properly before the appellate

court, the girlfriend of the decedent's motion for sanctions and attorney fees under Miss. Code Ann. § 11-55-5(1) and Miss. R. Civ. P. 11(b) was waived since she filed no notice of appeal for her "counter-appeal" as required by Miss. R. App. P. 4(a). Moreover, once the chancellor held the matter in abeyance, the record did not reflect that the girlfriend raised the motion for sanctions again until her appellate brief and she did not file her notice of appeal until 28 days after entry of the final judgment; at any time in the interim, the girlfriend could have requested a ruling on her motion for sanctions, but she failed to do so. *Frazier v. Loew (In re Caspelich)*, 22 So. 3d 1199, 2009 Miss. App. LEXIS 200 (Miss. Ct. App. 2009).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, the services company was not entitled to recover attorney fees for the defense of a withdrawn counterclaim under Miss. R. Civ. P. 11(b) and Miss. Code Ann. § 11-55-5(1) because, even though the counterclaim was weak, there was no showing that it lacked any hope of success. *Cain v. Cain*, 967 So. 2d 654, 2007 Miss. App. LEXIS 445 (Miss. Ct. App. 2007).

Appellate court affirmed a grant of summary judgment in favor of defendants as plaintiff had admitted it had no contract with a group of property owners to auction their property, but defendants' request for attorney fees under Miss. Code Ann. § 11-55-5(1) was denied as the court could not state that plaintiff's claim was substantially without justification. *John Mzingo Real Estate & Auction, Inc. v. Nat'l Auction Group, Inc.*, 925 So. 2d 141, 2006 Miss. App. LEXIS 201 (Miss. Ct. App. 2006).

To be awarded attorney's fees, the mother would have had to have been successful in her action against the father regarding child support, but she was not; there had been an extra-judicial modification to the child support agreement, but the father was compliant with the modified agreement. The failure to pay the daughter's medical expenses was the result of the mother not providing the father with proof of the expenses, and his willingness to pay those expenses was evident

in the record where upon presentation of the bills, the father promptly paid them; thus, the mother was not entitled to an award of attorney's fees. *Bryant v. Bryant*, 924 So. 2d 627, 2006 Miss. App. LEXIS 190 (Miss. Ct. App. 2006).

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., because the father's claim for custody was not frivolous pursuant to Miss. Rev. Code §§ 11-55-5(1) and 11-55-3(a). He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. *Adcock v. Van Norman*, 918 So. 2d 747, 2005 Miss. App. LEXIS 208 (Miss. Ct. App.), aff'd in part and rev'd in part, 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

Trial court did not err in denying the doctors' motion for sanctions where nothing in the record supported their claim that they were entitled to fees and expenses because the patient fired her counsel shortly before trial and caused delay of the proceedings and great expense to them; the trial court did not find that the patient requested a continuance for an

improper purpose or to delay the trial, but allowed the patient time to obtain new counsel and ordered that each party pay its own fees and expenses. *Hodges v. Lucas*, 904 So. 2d 1098, 2004 Miss. App. LEXIS 975 (Miss. Ct. App. 2004).

Award of attorney fees to the husband in a divorce action was improper where the chancellor never made a finding that the wife had fabricated the sexual abuse charges involving their older son and had in some manner convinced the child to make the statements that he did; an award of some amount of fees incurred by the husband allocable to enforcing the visitation order might be supportable but a finding of contempt must first have been made. *Gregory v. Gregory*, 881 So. 2d 840, 2003 Miss. App. LEXIS 1082 (Miss. Ct. App. 2003), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1333 (Miss. 2004).

Though the Mississippi Life and Health Guaranty Association "stretched the limits" in various defenses it raised to defeat a trustee's claim for coverage for sums lost under an annuity contract with an insolvent insurer, the circuit court did not abuse its discretion by denying the trustee's request for attorney's fees. *Bank of Miss. v. Miss. Life & Health Ins. Guar. Ass'n*, 850 So. 2d 127, 2003 Miss. App. LEXIS 137 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond. 37 A.L.R.2d 525.

Malicious prosecution or similar tort action predicated upon disciplinary proceedings against an attorney. 52 A.L.R.2d 1217.

Use of criminal process to collect debt as abuse of process. 27 A.L.R.3d 1202.

Conduct of attorney in connection with making objections or taking exceptions as contempt of court. 68 A.L.R.3d 314.

Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution. 87 A.L.R.3d 554.

Method employed in collecting debt due client as ground for disciplinary action against attorney. 93 A.L.R.3d 880.

Civil liability of attorney for abuse of process. 97 A.L.R.3d 688.

Liability of attorney, acting for client, for malicious prosecution. 46 A.L.R.4th 249.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 A.L.R.4th 843.

Attorney's liability under state law for opposing party's counsel fees. 56 A.L.R.4th 486.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Bringing of frivolous civil claim or action as ground for discipline of attorney. 85 A.L.R.4th 544.

What circumstances justify award of damages and/or double costs against appellant's attorney under 28 USCS sec.

1912, or Rule 38 of the Federal Rules of Appellate Procedure. 50 A.L.R. Fed. 652.

Authority of United States District Court, under 28 USCS sec. 1651(a), to enjoin, sua sponte, a party from filing further papers in support of frivolous claim. 53 A.L.R. Fed. 651.

Award of damages or costs under 28 USCS sec. 1912 or Rule 38 of Federal Rules of Appellate Procedure, against appellant who brings frivolous appeal. 67 A.L.R. Fed. 319.

Attorney's liability under 42 USCS sec. 1983 for improperly instituting or pursuing legal procedure. 72 A.L.R. Fed. 724.

Inherent power of Federal District Court to impose monetary sanctions on counsel in absence of contempt of court. 77 A.L.R. Fed. 789.

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct, 31 A.L.R. Fed. 833; 80 A.L.R. Fed. 302.

What conduct constitutes multiplying proceedings unreasonably and vexa-

tiously so as to warrant imposition of liability on counsel under 28 USCS sec. 1927 for excess costs, expenses, and attorney fees. 81 A.L.R. Fed. 36.

Am. Jur.

6 Am. Jur. 2d, Attachment and Garnishment § 20 et seq.

16A Am. Jur. 2d, Constitutional Law § 664.

20 Am. Jur. 2d, Costs §§ 32, 33.

CJS.

20 C.J.S., Costs §§ 209-214.

72 C.J.S., Process §§ 136-140.

Lawyers' Edition.

Supreme Court's views as to awards of attorneys' fees in federal civil rights cases. 87 L. Ed. 2d 713.

Law Reviews.

Robertson, Discovering Rule 11 of the Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

§ 11-55-7. Award of costs and attorney's fees; amount of award; factors to consider.

In determining the amount of an award of costs or attorney's fees, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorney's fees and costs and the amount to be assessed:

(a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;

(b) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;

(c) The availability of facts to assist in determining the validity of an action, claim or defense;

(d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;

(e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;

(f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;

(g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

(h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;

(i) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;

(j) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and

(k) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

HISTORY: Laws, 1988, ch. 495, § 4, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

JUDICIAL DECISIONS

ANALYSIS

1. In general.
2. Jurisdiction.
3. Attorneys' fees awarded excessive.

1. In general.

Because the circuit court failed to make any of the required findings as to the appropriateness of an award of attorney's fees, the circuit court abused its discretion. *Wirtz v. Adams Cty. Bd. of Supervisors*, — So. 3d —, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. Apr. 16, 2019).

It was error to award a town and school district attorney's fees because the court did not consider required statutory factors. *Tunica County v. Town of Tunica*, 227 So. 3d 1007, 2017 Miss. LEXIS 179 (Miss. 2017).

Trial court did not err in awarding attorney's fees and expenses to a patient pursuant to the Litigation Accountability Act because the patient had to incur unnecessary expenses in a doctor's action seeking payment for medical services; prior to the lawsuit, the patient advised the doctor's office they were attempting to collect payment from the wrong person, but the doctor still served the patient with the summons and complaint. *Monaghan v. Autry*, 229 So. 3d 201, 2017 Miss. App. LEXIS 155 (Miss. Ct. App. 2017).

Although a former professor had no hope of success on his negligence-based

claims against university staff who were immune under Miss. Code Ann. § 11-46-7(2), they were not entitled to fees incurred defending against those claims after the professor conceded them in his responses to summary judgment motions. *Payne v. Univ. of S. Miss.*, — F. Supp. 3d —, 2015 U.S. Dist. LEXIS 73028 (S.D. Miss. June 5, 2015), *aff'd*, 681 Fed. Appx. 384, 2017 U.S. App. LEXIS 4495 (5th Cir. Miss. 2017).

Trial court did not err in ordering sanctions in a citizen's action against a city, a municipal court, and a municipal court judge pursuant to the Mississippi Litigation Accountability Act and Miss. R. Civ. P. 11(b) because the record clearly supported a finding that the citizen pursued a frivolous collateral action in trial court and that the sanctions were appropriate; in granting sanctions of attorney fees against the citizen pursuant to the factors set out in the Litigation Accountability Act, Miss. Code Ann. § 11-55-7, and Rule 11(b), the trial court found that the action was a frivolous action filed without substantial notification in order to harass the city, municipal court, and municipal court judge. *Prewitt v. City of Oxford*, 44 So. 3d 922, 2010 Miss. LEXIS 184 (Miss. 2010), *cert. denied*, 2010 Miss. LEXIS 274 (Miss. June 3, 2010), *cert. denied*, 562 U.S. 893, 131 S. Ct. 294, 178 L. Ed. 2d 142, 2010 U.S. LEXIS 6224 (U.S. 2010).

Chancellor was within her discretion in finding the grandparents' visitation claim, the claims concerning the dissemination of the daughter's medical records, and custody claims were without substantial justification; therefore, the chancellor properly found the attorney liable for sanctions under the Litigation Accountability Act. In re Spencer, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, the parents were ordered to pay the county's attorney fees that were incurred in defending the action on appeal because the appeal was frivolous, as they had no hope of success against the county; the parents were only able to construct a one-sentence argument against the county and the undisputed facts showed that the passengers were involved in criminal activity at the time of the death, namely fleeing from the police in a stolen vehicle. McCoy v. City of Florence, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Trial court erred in awarding attorney fees to the father and against the state human service agency in its action to obtain child support for the mother as the court did not consider the factors for awarding attorney fees set forth in Miss. Code Ann. § 11-55-7, as it was required to do, but instead noted only that the father's motion for attorney fees as a sanction for the state human service agency's allegedly frivolous pleading was granted. State Dep't of Human Servs. v. Shelby, 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Trial court improperly awarded sanctions against the Mississippi Department of Human Services in a suit that sought to establish that a divorce decree that did not include a child support award was either void or insufficiently supported; neither argument was necessarily frivolous, and the trial court failed to set forth its reasons for awarding sanctions. Miss. Dep't of Human Servs. v. Shelby, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), op. withdrawn, sub. op., 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

The court properly awarded attorney fees and expenses under the act on the ground that the action was brought without substantial justification as there was no evidence that either the plaintiff or his attorney exercised sufficient effort to determine the validity of the claims before they were asserted. Wyssbrod v. Wittjen, 798 So. 2d 352, 2001 Miss. LEXIS 23 (Miss. 2001).

Where a chancery court gave no specific reasons for imposing sanctions, as required by the Litigation Accountability Act (§ 11-55-1 et seq.), the sanctions imposed must have been pursuant to Rule 11, Miss. R. Civ. P. Leaf River Forest Prods. v. Deakle, 661 So. 2d 188, 1995 Miss. LEXIS 455 (Miss. 1995).

The adoption of Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, did not render void the Mississippi Litigation Accountability Act of 1988 (§§ 11-55-1 et seq.), which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment, since there is no apparent conflict between the plain language of the statutes and the rule. Stevens v. Lake, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

By stating that the court shall specifically set forth the reasons for awarding attorney's fees and costs and enumerating factors to be considered by the court when making such an award, § 11-55-7 augments Rule 11, Miss. R. Civ. Proc., which provides for sanctions for the filing of a motion or pleading which is frivolous or was filed for the purpose of harassment or delay, and § 11-55-5, which provides for sanctions for the bringing of an action or the assertion of a claim or defense which is without substantial justification or was interposed for delay or harassment. Stevens v. Lake, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

A petitioner's action for a writ of mandamus compelling a county board of education to adopt a resolution requesting the board of supervisors to create single member districts was not without substantial

justification, and therefore the trial court did not err in declining to award attorney's fees to the school board under the Litigation Accountability Act (§§ 11-55-1 et seq.), even though the petitioner did not make an effort to dismiss the action when he learned that his claim was moot though the board of education suggested that he do so, where there was no evidence that the action was prosecuted in bad faith or for an improper purpose, there were no issues of fact determinative of the validity of the claim in conflict at the time of the first hearing, and there was no prevailing party since the petitioner's claim became moot via action of the school board following the first hearing. *Jackson County School Bd. v. Osborn*, 605 So. 2d 731, 1992 Miss. LEXIS 313 (Miss. 1992).

2. Jurisdiction.

The court had jurisdiction to award attorney fees and expenses against both the plaintiff and his out-of-state counsel notwithstanding that counsel was no longer

representing the plaintiff at the time of the award and his authority to practice law pro hac vice in the court had been rescinded, as he submitted to the jurisdiction of the court by appearing for the plaintiff and he was served with notice of the hearing on attorney fees and expenses. *Wyssbrod v. Wittjen*, 798 So. 2d 352, 2001 Miss. LEXIS 23 (Miss. 2001).

3. Attorneys' fees awarded excessive.

Chancellor abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record as there was nothing in the Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 et seq., or Miss. R. Civ. P. 11 which supported awarding attorneys' fees and expenses in excess of those actually incurred. *In re Spencer*, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss.), cert. denied, 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600 (U.S. 2008).

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Conduct of attorney in connection with making objections or taking exceptions as contempt of court. 68 A.L.R.3d 314.

Liability of attorney, acting for client, for malicious prosecution. 46 A.L.R.4th 249.

Excessiveness or inadequacy of compensatory damages for malicious prosecution. 50 A.L.R.4th 843.

Attorney's liability under state law for opposing party's counsel fees. 56 A.L.R.4th 486.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Bringing of frivolous civil claim or ac-

tion as ground for discipline of attorney. 85 A.L.R.4th 544.

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct, 31 A.L.R. Fed. 833.

What circumstances justify award of damages and/or double costs against appellant's attorney under 28 USCS sec. 1912, or Rule 38 of the Federal Rules of Appellate Procedure. 50 A.L.R. Fed. 652.

Authority of United States District Court, under 28 USCS sec. 1651(a), to enjoin, sua sponte, a party from filing further papers in support of frivolous claim. 53 A.L.R. Fed. 651.

Award of damages or costs under 28 USCS sec. 1912 or Rule 38 of Federal Rules of Appellate Procedure, against appellant who brings frivolous appeal. 67 A.L.R. Fed. 319.

Attorney's liability under 42 USCS sec. 1983 for improperly instituting or pursuing legal procedure. 72 A.L.R. Fed. 724.

Inherent power of Federal District Court to impose monetary sanctions on counsel in absence of contempt of court. 77 A.L.R. Fed. 789.

What conduct constitutes multiplying proceedings unreasonably and vexatiously so as to warrant imposition of liability on counsel under 28 USCS sec. 1927 for excess costs, expenses, and attorney fees. 81 A.L.R. Fed. 36.

Am. Jur.

6 Am. Jur. 2d (Rev), Attachment and Garnishment § 17 et seq.

16A Am. Jur. 2d, Constitutional Law § 664.

20 Am. Jur. 2d, Costs §§ 32, 33.

CJS.

20 C.J.S., Costs §§ 209-214.

Lawyers' Edition.

Supreme Court's views as to awards of attorneys' fees in federal civil rights cases. 87 L. Ed. 2d 713.

Law Reviews.

Robertson, Discovering Rule 11 of the Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

§ 11-55-9. Limitations of chapter.

Nothing in this chapter shall be construed to prevent an attorney and his client from negotiating in private the actual fee which the client is to pay the client's attorney. Nothing in this chapter is intended to limit the authority of the court to approve written stipulations filed with the court or oral stipulations in open court agreeing to no award of attorney's fees or costs, or an award of attorney's fees or costs in a manner different than that provided in this chapter.

HISTORY: Laws, 1988, ch. 495, § 5, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

§ 11-55-11. Application of chapter.

This chapter shall apply in all cases unless attorney's fees are otherwise specifically provided by statute or court rule, in which case the provision allowing the greater award shall prevail.

HISTORY: Laws, 1988, ch. 495, § 6, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

JUDICIAL DECISIONS

1. In general.

This section is not applicable in the context of a criminal case. State v. Blen-

den, 748 So. 2d 77, 1999 Miss. LEXIS 219 (Miss. 1999).

RESEARCH REFERENCES

Law Reviews.

Robertson, Discovering Rule 11 of the

Mississippi Rules of Civil Procedure. 8 Miss. C. L. Rev. 111, Spring, 1988.

§ 11-55-13. Severability.

If any section, paragraph, sentence, phrase or any part of this chapter shall be held invalid or unconstitutional, such holding shall not affect any other section, paragraph, sentence, clause, phrase or part of this chapter which is not in and of itself invalid or unconstitutional. Moreover, if the application of this chapter, or of any portion of it, to any person or circumstance is held invalid, the invalidity shall not affect the application of this chapter to other persons or circumstances which can be given effect without the invalid provision or application.

HISTORY: Laws, 1988, ch. 495, § 7, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

§ 11-55-15. Actions to which chapter applies.

This chapter shall apply to any suit or claim or defense or appeal filed or perfected subsequent to July 1, 1988. It shall also apply to any suit or claim or defense or appeal which has been filed or perfected prior to July 1, 1988, and which is not dismissed within one hundred eighty (180) days after July 1, 1988.

HISTORY: Laws, 1988, ch. 495, § 8, eff from and after July 1, 1988.

Cross References — Sanctions for abusive pleadings and motions under rules of civil procedure, see Miss. R. Civ. P. 11.

RESEARCH REFERENCES**Law Reviews.**

Robertson, Discovering Rule 11 of the

Mississippi Rules of Civil Procedure. 8
Miss. C. L. Rev. 111, Spring, 1988.

CHAPTER 57.

STRUCTURED SETTLEMENTS

Sec.

11-57-1.	Short Title.
11-57-3.	Definitions.
11-57-5.	Disclosure statement.
11-57-7.	Transfers of structured settlement payment rights.
11-57-9.	Consequences of transfer.
11-57-11.	Application for transfer; notification; hearing.
11-57-13.	Transferee and payee responsibilities.
11-57-15.	Applicability.

§ 11-57-1. Short Title.

This chapter shall be known and may be cited as the “Structured Settlement Protection Act.”

HISTORY: Laws, 2002, ch. 530, § 1, eff from and after July 1, 2002.

RESEARCH REFERENCES

ALR.	Structured Settlement Protection Acts..
Construction and Application of State	27 A.L.R. 6th 323.

§ 11-57-3. Definitions.

The following words and phrases shall have the meanings ascribed herein, unless the context clearly indicates otherwise:

(a) “Annuity issuer” means an insurer that has issued a contract to fund periodic payments under a structured settlement.

(b) “Dependents” include a payee’s spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony.

(c) “Discounted present value” means the present value of future payments determined by discounting such payments to the present using the most recently published Applicable Federal Rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

(d) “Gross advance amount” means the sum payable to the payee or for the payee’s account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration.

(e) “Independent professional advice” means advice of an attorney, certified public accountant, actuary or other licensed professional adviser.

(f) “Interested parties” means, with respect to any structured settlement, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee’s death, the annuity issuer,

the structured settlement obligor, and any other party that has continuing rights or obligations under such structured settlement.

(g) “Net advance amount” means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under Section 11-57-5(e).

(h) “Payee” means an individual who is receiving tax-free payments under a structured settlement and proposes to make a transfer of payment rights thereunder.

(i) “Periodic payments” includes both recurring payments and scheduled future lump-sum payments.

(j) “Qualified assignment agreement” means an agreement providing for a qualified assignment within the meaning of 26 USCS 130.

(k) “Responsible administrative authority” means, with respect to a structured settlement, any government authority vested by law with exclusive jurisdiction over the settled claim resolved by such structured settlement.

(l) “Settled claim” means the original tort claim or workers’ compensation claim resolved by a structured settlement.

(m) “Structured settlement” means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers’ compensation claim.

(n) “Structured settlement agreement” means the agreement, judgment, stipulation or release embodying the terms of a structured settlement.

(o) “Structured settlement obligor” means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.

(p) “Structured settlement payment rights” means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, where:

(i) The payee is domiciled in, or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is located in, this state;

(ii) The structured settlement agreement was approved by a court or responsible administrative authority in this state; or

(iii) The structured settlement agreement is expressly governed by the laws of this state.

(q) “Terms of the structured settlement” includes, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement and any order or other approval of any court or responsible administrative authority or other government authority that authorized or approved such structured settlement.

(r) “Transfer” means any sale, assignment, pledge, hypothecation or other alienation or encumbrance of structured settlement payment rights

made by a payee for consideration; provided that the term “transfer” does not include the creation or perfection of a security interest in structured settlement payment rights under a blanket security agreement entered into with an insured depository institution, in the absence of any action to redirect the structured settlement payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the structured settlement payment rights.

(s) “Transfer agreement” means the agreement providing for a transfer of structured settlement payment rights.

(t) “Transfer expenses” means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorney’s fees, escrow fees, lien recordation fees, judgment and lien search fees, finder’s fees, commissions, and other payments to a broker or other intermediary; “transfer expenses” do not include preexisting obligations of the payee payable for the payee’s account from the proceeds of a transfer.

(u) “Transferee” means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

HISTORY: Laws, 2002, ch. 530, § 2, eff from and after July 1, 2002.

§ 11-57-5. Disclosure statement.

Not less than three (3) days before the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than fourteen (14) points, setting forth:

(a) The amounts and due dates of the structured settlement payments to be transferred;

(b) The aggregate amount of such payments;

(c) The discounted present value of the payments to be transferred, which shall be identified as the “calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities,” and the amount of the Applicable Federal Rate used in calculating such discounted present value;

(d) The gross advance amount;

(e) An itemized listing of all applicable transfer expenses, other than attorney’s fees and related disbursement payable in connection with the transferee’s application for approval of the transfer, and the transferee’s best estimate of the amount of any such fees and disbursements;

(f) The net advance amount;

(g) The amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and

(h) A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee.

HISTORY: Laws, 2002, ch. 530, § 3, eff from and after July 1, 2002.

§ 11-57-7. Transfers of structured settlement payment rights.

No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order or order of a responsible administrative authority based on express findings by such court or responsible administrative authority that:

(a) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;

(b) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing; and

(c) The transfer does not contravene any applicable statute or the order of any court or other government authority.

HISTORY: Laws, 2002, ch. 530, § 4, eff from and after July 1, 2002.

JUDICIAL DECISIONS

ANALYSIS

1. Notice of transfer.
2. Transfer deemed ineffective.
3. Court approval of transfer.

1. Notice of transfer.

Notice of the transfer of structured settlement payment rights under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. *RSL Funding, LLC v. Saucier* (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

2. Transfer deemed ineffective.

As appellant did not provide appellee with the notice required under Miss. Code Ann. 11-57-11(2) of Mississippi's Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15,

appellee's purported transfer to appellant of his rights to receive structured settlement payments was ineffective. *RSL Funding, LLC v. Saucier* (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

3. Court approval of transfer.

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. *RSL Funding, LLC v. Saucier* (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

§ 11-57-9. Consequences of transfer.

Following a transfer of structured settlement payment rights under this chapter:

(a) The structured settlement obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;

(b) The transferee shall be liable to the structured settlement obligor and the annuity issuer:

(i) If the transfer contravenes the terms of the structured settlement, for any taxes incurred by such parties as a consequence of the transfer; and

(ii) For any other liabilities or costs, including reasonable costs and attorney's fees, arising from compliance by such parties with the order of the court or responsible administrative authority or arising as a consequence of the transferee's failure to comply with this chapter;

(c) Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two (2) or more transferees or assignees; and

(d) Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this chapter.

HISTORY: Laws, 2002, ch. 530, § 5, eff from and after July 1, 2002.

§ 11-57-11. Application for transfer; notification; hearing.

(1) An application under this chapter for approval of a transfer of structured settlement payment rights shall be made by the transferee and may be brought in the county in which the payee resides, in the county in which the structured settlement obligor or the annuity issuer maintains its principal place of business, or in any court or before any responsible administrative authority which approved the structured settlement agreement.

(2) Not less than twenty (20) days prior to the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under Section 11-57-7, the transferee shall file with the court or responsible administrative authority and serve on all interested parties a notice of the proposed transfer and the application for its authorization, including with such notice:

(a) A copy of the transferee's application;

(b) A copy of the transfer agreement;

(c) A copy of the disclosure statement required under Section 11-57-5;

(d) A listing of each of the payee's dependents, together with each dependent's age;

(e) Notification that any interested party is entitled to support, oppose or otherwise respond to the transferee's application, either in person or by

counsel, by submitting written comments to the court or responsible administrative authority or by participating in the hearing; and

(f) Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed which shall be not less than fifteen (15) days after service of the transferee's notice in order to be considered by the court or responsible administrative authority.

HISTORY: Laws, 2002, ch. 530, § 6, eff from and after July 1, 2002.

JUDICIAL DECISIONS

ANALYSIS

1. Notice of transfer.
2. Transfer deemed ineffective.
3. Court approval of transfer.

1. Notice of transfer.

Notice of the transfer of structured settlement payment rights under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. *RSL Funding, LLC v. Saucier* (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

2. Transfer deemed ineffective.

As appellant did not provide appellee with the notice required under Miss. Code Ann. 11-57-11(2) of Mississippi's Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-15,

appellee's purported transfer to appellant of his rights to receive structured settlement payments was ineffective. *RSL Funding, LLC v. Saucier* (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

3. Court approval of transfer.

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. *RSL Funding, LLC v. Saucier* (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

§ 11-57-13. Transferee and payee responsibilities.

(1) The provisions of this chapter may not be waived by any payee.

(2) Any transfer agreement entered into on or after July 1, 2002, by a payee who resides in this state shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this state. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

(3) No transfer of structured settlement payment rights shall extend to any payments that are life-contingent unless, prior to the date on which the

payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for (a) periodically confirming the payee's survival, and (b) giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death.

(4) No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to be proposed transferee or any assignee based on any failure of such transfer to satisfy the conditions of this chapter.

(5) Nothing contained in this chapter shall be construed to authorize any transfer of structured settlement payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into before July 1, 2002, is valid or invalid.

(6) Compliance with the requirements set forth in § 11-57-5 and fulfillment of the conditions set forth in § 11-57-7 shall be solely the responsibility of the transferee in any transfer of structured settlement payment rights, and neither the structured settlement obligor nor the annuity issuer shall bear any responsibility for, or any liability arising from, noncompliance with such requirements or failure to fulfill such conditions.

HISTORY: Laws, 2002, ch. 530, § 7, eff from and after July 1, 2002.

§ 11-57-15. Applicability.

This chapter shall apply to any transfer of structured settlement payment rights under a transfer agreement entered into on or after August 1, 2002; provided, however, that nothing contained herein shall imply that any transfer under a transfer agreement reached before such date is either effective or ineffective.

HISTORY: Laws, 2002, ch. 530, § 8, eff from and after July 1, 2002.

CHAPTER 59.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

Sec.

11-59-1.	Short title.
11-59-3.	Definitions.
11-59-5.	Issuance of subpoena.
11-59-7.	Service of subpoena.
11-59-9.	Deposition, production and inspection.
11-59-11.	Application to court.
11-59-13.	Uniformity of application and construction.
11-59-15.	Application to pending actions.

§ 11-59-1. Short title.

This chapter may be cited as the Uniform Interstate Depositions and Discovery Act.

HISTORY: Laws, 2011, ch. 347, § 1, eff from and after July 1, 2011.

Comparable Laws from other States — Alabama: Code of Ala. § 12-21-400 et seq.
 California: Cal Code Civ Proc § 2029.100 et seq.
 Colorado: C.R.S. § 13-90.5-101 et seq.
 Delaware: 10 Del. C. § 4311.
 District of Columbia: D.C. Code § 13-441 et seq.
 Georgia: O.C.G.A. § 24-13-110 et seq.
 Hawaii: HRS § 624D-1 et seq.
 Illinois: 735 ILCS 35/1 et seq.
 Indiana: Burns Ind. Code Ann. § 34-44.5-1-1 et seq.
 Kansas: K.S.A. § 60-228a.
 Kentucky: KRS § 421.360
 Louisiana: La. R.S. § 13:3825.
 Maryland: Md. Courts and Judicial Proceedings Code Ann. § 9-407 et seq.
 Michigan: MCLS § 600.2201 et seq.
 New York: NY CLS CPLR § 3119.
 North Carolina: N.C. Gen. Stat. § 1F-1 et seq.
 Ohio: ORC Ann. 2319.09.
 South Carolina: S.C. Code Ann. § 15-47-100 et seq.
 Tennessee: Tenn. Code Ann. § 24-9-201 et seq.
 Utah: Utah Code Ann. § 78B-17-101 et seq.
 Virgin Islands: 5 V.I.C. § 4922 et seq.
 Virginia: Va. Code Ann. § 8.01-412.8 et seq.
 Washington: Rev. Code Wash. (ARCW) § 5.51.010 et seq.
 West Virginia: W. Va. Code § 56-12-1 et seq.

§ 11-59-3. Definitions.

In this chapter:

- (1) “Foreign jurisdiction” means a state other than this state.
- (2) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) Attend and give testimony at a deposition;

(B) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) Permit inspection of premises under the control of the person.

HISTORY: Laws, 2011, ch. 347, § 2, eff from and after July 1, 2011.

§ 11-59-5. Issuance of subpoena.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this chapter does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court’s procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) must:

(A) Incorporate the terms used in the foreign subpoena; and

(B) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

HISTORY: Laws, 2011, ch. 347, § 3, eff from and after July 1, 2011.

§ 11-59-7. Service of subpoena.

A subpoena issued by a clerk of court under Section 11-59-5 must be served in compliance with Rule 45 of the Rules of Civil Procedure.

HISTORY: Laws, 2011, ch. 347, § 4, eff from and after July 1, 2011.

§ 11-59-9. Deposition, production and inspection.

Rule 45 of the Mississippi Rules of Civil Procedure and Rule 2.01 of the Uniform Rules of Circuit and County Court Practice apply to subpoenas issued under Section 11-59-5.

HISTORY: Laws, 2011, ch. 347, § 5, eff from and after July 1, 2011.

§ 11-59-11. Application to court.

An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under Section 11-59-5 must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted.

HISTORY: Laws, 2011, ch. 347, § 6, eff from and after July 1, 2011.

§ 11-59-13. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

HISTORY: Laws, 2011, ch. 347, § 7, eff from and after July 1, 2011.

§ 11-59-15. Application to pending actions.

This chapter applies to requests for discovery in cases pending on July 1, 2011.

HISTORY: Laws, 2011, ch. 347, § 8, eff from and after July 1, 2011.

CHAPTER 61.

MISSISSIPPI RELIGIOUS FREEDOM RESTORATION
ACT

Sec.

11-61-1. Mississippi Religious Freedom Restoration Act; legislative findings; purpose; applicability; relation to First Amendment.

§ 11-61-1. Mississippi Religious Freedom Restoration Act; legislative findings; purpose; applicability; relation to First Amendment.

(1) This section shall be known and may be cited as the Mississippi Religious Freedom Restoration Act.

(2) The Mississippi Legislature finds the following:

(a) The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(b) Laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(c) Government should not substantially burden religious exercise without compelling justification;

(d) In *Employment Division v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(e) The compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(3) The purposes of this section are as follows:

(a) To restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(b) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(4) As used in this section, the following words shall have the following meanings:

(a) “Government” means any branch, department, agency, instrumentality or political subdivision of the State of Mississippi and any official or other person acting under color of law of the State of Mississippi.

(b) “Demonstrates” means to meet the burdens of going forward with the evidence and of persuasion.

(c) “Exercise of religion” means the exercise of religion under the First Amendment to the Constitution.

(5)(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in paragraph (b) of this subsection.

(b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

- (i) Is in furtherance of a compelling governmental interest; and
- (ii) Is the least restrictive means of furthering that compelling governmental interest.

(6) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government, as defined by subsection (4) of this section. Standing to assert a claim or defense under this section shall be the same as the general rules of standing under Article III of the United States Constitution.

(7)(a) This section applies to all state laws, rules, regulations and any municipal or county ordinances, rules or regulations and the implementation of those laws, whether statutory or otherwise, and whether adopted before or after July 1, 2014.

(b) Any such law, rule, regulation or ordinances adopted after July 1, 2014, shall be subject to this section unless such law explicitly excludes such application by reference to this section.

(8) Nothing in this section shall be construed to authorize any government to burden any religious belief.

(9) Nothing in this section shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this section. As used in this subsection, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(10) Nothing in this section shall create any rights by an employee against an employer if the employer is not the government.

HISTORY: Laws, 2014, ch. 474, § 1, eff from and after July 1, 2014.

CHAPTER 62.

PROTECTING FREEDOM OF CONSCIENCE FROM GOVERNMENT DISCRIMINATION ACT

Sec.

- 11-62-1. Short title.
- 11-62-3. Protected beliefs.
- 11-62-5. Discriminatory action by state government prohibited.
- 11-62-7. Discriminatory action defined.
- 11-62-9. Actions under chapter.
- 11-62-11. Remedies.
- 11-62-13. Limitations period.
- 11-62-15. Construction and applicability.
- 11-62-17. Definitions.
- 11-62-19. Relation to Mississippi Religious Freedom Restoration Act.

§ 11-62-1. Short title.

This chapter shall be known and may be cited as the “Protecting Freedom of Conscience from Government Discrimination Act.”

HISTORY: Laws, 2016, ch. 334, § 1, eff from and after July 1, 2016.

Editor’s Notes — In *Barber v. Bryant*, 2016 U.S. Dist. LEXIS 86120, the United States District Court for the Southern District of Mississippi held that HB 1523 (Chapter 334, Laws of 2016) violates the Establishment Clause in at least two ways: it establishes an official preference for certain religious beliefs over others because it enumerates three religious beliefs or moral convictions entitled to protection; and its broad religious accommodations come at the expense of other citizens, giving persons with the three enumerated religious beliefs absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service. On June 30, 2016, the day before HB 1523 was to take effect, the court granted plaintiffs’ motions and preliminarily enjoined HB 1523.

HB 1523 has been codified as Chapter 62 in Title 11, comprising Sections 11-62-1 through 11-62-19.

§ 11-62-3. Protected beliefs.

The sincerely held religious beliefs or moral convictions protected by this chapter are the belief or conviction that:

- (a) Marriage is or should be recognized as the union of one man and one woman;
- (b) Sexual relations are properly reserved to such a marriage; and
- (c) Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.

HISTORY: Laws, 2016, ch. 334, § 2, eff from and after July 1, 2016.

§ 11-62-5. Discriminatory action by state government prohibited.

(1) The state government shall not take any discriminatory action against a religious organization wholly or partially on the basis that such organization:

(a) Solemnizes or declines to solemnize any marriage, or provides or declines to provide services, accommodations, facilities, goods or privileges for a purpose related to the solemnization, formation, celebration or recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3;

(b) Makes any employment-related decision including, but not limited to, the decision whether or not to hire, terminate or discipline an individual whose conduct or religious beliefs are inconsistent with those of the religious organization, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3; or

(c) Makes any decision concerning the sale, rental, occupancy of, or terms and conditions of occupying a dwelling or other housing under its control, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3.

(2) The state government shall not take any discriminatory action against a religious organization that advertises, provides or facilitates adoption or foster care, wholly or partially on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3.

(3) The state government shall not take any discriminatory action against a person who the state grants custody of a foster or adoptive child, or who seeks from the state custody of a foster or adoptive child, wholly or partially on the basis that the person guides, instructs or raises a child, or intends to guide, instruct, or raise a child based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3.

(4) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person declines to participate in the provision of treatments, counseling, or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services based upon a sincerely held religious belief or moral conviction described in Section 11-62-3. This subsection (4) shall not be construed to allow any person to deny visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law.

(5) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person has provided or declined to provide the following services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, celebration, or

recognition of any marriage, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3:

(a) Photography, poetry, videography, disc-jockey services, wedding planning, printing, publishing or similar marriage-related goods or services; or

(b) Floral arrangements, dress making, cake or pastry artistry, assembly-hall or other wedding-venue rentals, limousine or other car-service rentals, jewelry sales and services, or similar marriage-related services, accommodations, facilities or goods.

(6) The state government shall not take any discriminatory action against a person wholly or partially on the basis that the person establishes sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings, based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3.

(7) The state government shall not take any discriminatory action against a state employee wholly or partially on the basis that such employee lawfully speaks or engages in expressive conduct based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3, so long as:

(a) If the employee's speech or expressive conduct occurs in the workplace, that speech or expressive conduct is consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief or conviction allowed; or

(b) If the employee's speech or expressive conduct occurs outside the workplace, that speech or expressive conduct is in the employee's personal capacity and outside the course of performing work duties.

(8)(a) Any person employed or acting on behalf of the state government who has authority to authorize or license marriages, including, but not limited to, clerks, registers of deeds or their deputies, may seek recusal from authorizing or licensing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3. Any person making such recusal shall provide prior written notice to the State Registrar of Vital Records who shall keep a record of such recusal, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The person who is recusing himself or herself shall take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal.

(b) Any person employed or acting on behalf of the state government who has authority to perform or solemnize marriages, including, but not limited to, judges, magistrates, justices of the peace or their deputies, may seek recusal from performing or solemnizing lawful marriages based upon or in a manner consistent with a sincerely held religious belief or moral conviction described in Section 11-62-3. Any person making such recusal

shall provide prior written notice to the Administrative Office of Courts, and the state government shall not take any discriminatory action against that person wholly or partially on the basis of such recusal. The Administrative Office of Courts shall take all necessary steps to ensure that the performance or solemnization of any legally valid marriage is not impeded or delayed as a result of any recusal.

HISTORY: Laws, 2016, ch. 334, § 3, eff from and after July 1, 2016.

§ 11-62-7. Discriminatory action defined.

(1) As used in this chapter, discriminatory action includes any action taken by the state government to:

(a) Alter in any way the tax treatment of, or cause any tax, penalty, or payment to be assessed against, or deny, delay, revoke, or otherwise make unavailable an exemption from taxation of any person referred to in Section 11-62-5;

(b) Disallow, deny or otherwise make unavailable a deduction for state tax purposes of any charitable contribution made to or by such person;

(c) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any state grant, contract, subcontract, cooperative agreement, guarantee, loan, scholarship, or other similar benefit from or to such person;

(d) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any entitlement or benefit under a state benefit program from or to such person;

(e) Impose, levy or assess a monetary fine, fee, penalty or injunction;

(f) Withhold, reduce, exclude, terminate, materially alter the terms or conditions of, or otherwise make unavailable or deny any license, certification, accreditation, custody award or agreement, diploma, grade, recognition, or other similar benefit, position, or status from or to any person; or

(g) Refuse to hire or promote, force to resign, fire, demote, sanction, discipline, materially alter the terms or conditions of employment, or retaliate or take other adverse employment action against a person employed or commissioned by the state government.

(2) The state government shall consider accredited, licensed or certified any person that would otherwise be accredited, licensed or certified, respectively, for any purposes under state law but for a determination against such person wholly or partially on the basis that the person believes, speaks or acts in accordance with a sincerely held religious belief or moral conviction described in Section 11-62-3.

HISTORY: Laws, 2016, ch. 334, § 4, eff from and after July 1, 2016.

§ 11-62-9. Actions under chapter.

(1) A person may assert a violation of this chapter as a claim against the state government in any judicial or administrative proceeding or as defense in

any judicial or administrative proceeding without regard to whether the proceeding is brought by or in the name of the state government, any private person or any other party.

(2) An action under this chapter may be commenced, and relief may be granted, in a court of the state without regard to whether the person commencing the action has sought or exhausted available administrative remedies.

(3) Violations of this chapter which are properly governed by Chapter 46, Title 11, Mississippi Code of 1972, shall be brought in accordance with that chapter.

HISTORY: Laws, 2016, ch. 334, § 5, eff from and after July 1, 2016.

§ 11-62-11. Remedies.

An aggrieved person must first seek injunctive relief to prevent or remedy a violation of this chapter or the effects of a violation of this chapter. If injunctive relief is granted by the court and the injunction is thereafter violated, then and only then may the aggrieved party, subject to the limitations of liability set forth in Section 11-46-15, seek the following:

- (a) Compensatory damages for pecuniary and nonpecuniary losses;
- (b) Reasonable attorneys' fees and costs; and
- (c) Any other appropriate relief, except that only declaratory relief and injunctive relief shall be available against a private person not acting under color of state law upon a successful assertion of a claim or defense under this chapter.

HISTORY: Laws, 2016, ch. 334, § 6, eff from and after July 1, 2016.

§ 11-62-13. Limitations period.

A person must bring an action to assert a claim under this chapter not later than two (2) years after the date that the person knew or should have known that a discriminatory action was taken against that person.

HISTORY: Laws, 2016, ch. 334, § 7, eff from and after July 1, 2016.

§ 11-62-15. Construction and applicability.

(1) This chapter shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the state and federal constitutions.

(2) The protection of free exercise of religious beliefs and moral convictions afforded by this chapter are in addition to the protections provided under federal law, state law, and the state and federal constitutions. Nothing in this chapter shall be construed to preempt or repeal any state or local law that is equally or more protective of free exercise of religious beliefs or moral convictions. Nothing in this chapter shall be construed to narrow the meaning

or application of any state or local law protecting free exercise of religious beliefs or moral convictions. Nothing in this chapter shall be construed to prevent the state government from providing, either directly or through an individual or entity not seeking protection under this chapter, any benefit or service authorized under state law.

(3) This chapter applies to, and in cases of conflict supersedes, each statute of the state that impinges upon the free exercise of religious beliefs and moral convictions protected by this chapter, unless a conflicting statute is expressly made exempt from the application of this chapter. This chapter also applies to, and in cases of conflict supersedes, any ordinance, rule, regulation, order, opinion, decision, practice or other exercise of the state government's authority that impinges upon the free exercise of religious beliefs or moral convictions protected by this chapter.

HISTORY: Laws, 2016, ch. 334, § 8, eff from and after July 1, 2016.

§ 11-62-17. Definitions.

As used in this chapter, the following words and phrases shall have the meanings ascribed in this section unless the context clearly indicates otherwise:

(1) "State benefit program" means any program administered or funded by the state, or by any agent on behalf of the state, providing cash, payments, grants, contracts, loans or in-kind assistance.

(2) "State government" means:

(a) The State of Mississippi or a political subdivision of the state;

(b) Any agency of the state or of a political subdivision of the state, including a department, bureau, board, commission, council, court or public institution of higher education;

(c) Any person acting under color of state law; and

(d) Any private party or third party suing under or enforcing a law, ordinance, rule or regulation of the state or political subdivision of the state.

(3) "Person" means:

(a) A natural person, in his or her individual capacity, regardless of religious affiliation or lack thereof, or in his or her capacity as a member, officer, owner, volunteer, employee, manager, religious leader, clergy or minister of any entity described in this section;

(b) A religious organization;

(c) A sole proprietorship, or closely held company, partnership, association, organization, firm, corporation, cooperative, trust, society or other closely held entity operating with a sincerely held religious belief or moral conviction described in this chapter; or

(d) Cooperatives, ventures or enterprises comprised of two (2) or more individuals or entities described in this subsection.

(4) "Religious organization" means:

(a) A house of worship, including, but not limited to, churches, synagogues, shrines, mosques and temples;

(b) A religious group, corporation, association, school or educational institution, ministry, order, society or similar entity, regardless of whether it is integrated or affiliated with a church or other house of worship; and

(c) An officer, owner, employee, manager, religious leader, clergy or minister of an entity or organization described in this subsection (4).

(5) “Adoption or foster care” or “adoption or foster care service” means social services provided to or on behalf of children, including:

(a) Assisting abused or neglected children;

(b) Teaching children and parents occupational, homemaking and other domestic skills;

(c) Promoting foster parenting;

(d) Providing foster homes, residential care, group homes or temporary group shelters for children;

(e) Recruiting foster parents;

(f) Placing children in foster homes;

(g) Licensing foster homes;

(h) Promoting adoption or recruiting adoptive parents;

(i) Assisting adoptions or supporting adoptive families;

(j) Performing or assisting home studies;

(k) Assisting kinship guardianships or kinship caregivers;

(l) Providing family preservation services;

(m) Providing family support services; and

(n) Providing temporary family reunification services.

HISTORY: Laws, 2016, ch. 334, § 9, eff from and after July 1, 2016.

§ 11-62-19. Relation to Mississippi Religious Freedom Restoration Act.

The provisions of this chapter shall be excluded from the application of Section 11-61-1.

HISTORY: Laws, 2016, ch. 334, § 10, eff from and after July 1, 2016.

Editor’s Notes — Section 11-61-1, referred to in this section, is the Mississippi Religious Freedom Restoration Act.

CHAPTER 63.
APPLICATION OF FOREIGN LAW

Sec.

11-63-1. Application of foreign law prohibited under certain circumstances.

§ 11-63-1. Application of foreign law prohibited under certain circumstances.

(1) In this section, “foreign law” means any law, rule, legal code or legal system other than the constitution, laws and ratified treaties of the United States and the territories of the United States, the constitution and laws of another state of the United States, Native American tribal law, the Mississippi Constitution of 1890, and the laws of this state.

(2) A court, arbitrator, administrative agency or other adjudicative, mediation or enforcement authority shall not enforce a foreign law if doing so would violate a right guaranteed to a natural person by the United States Constitution or the Mississippi Constitution of 1890.

HISTORY: Laws, 2015, ch. 408, § 1, eff from and after July 1, 2015.

CHAPTER 65.**ENFORCEMENT OF FEDERAL LAWS, ORDERS, RULES**

Sec.

11-65-1. Enforcement of certain federal laws, orders, or rules prohibited.

§ 11-65-1. Enforcement of certain federal laws, orders, or rules prohibited.

No federal executive order, agency order, law not enrolled by the United States Congress and signed by the President of the United States, rule, regulation or administrative interpretation of a law or statute issued, enacted or promulgated after July 1, 2016, that violates the United States Constitution or the Mississippi Constitution of 1890 shall be enforced or ordered to be enforced by any official, agent or employee of this state or a political subdivision thereof.

HISTORY: Laws, 2016, ch. 421, § 5, eff from and after passage (approved Apr. 15, 2016).

CHAPTER 67.

ASBESTOS BANKRUPTCY TRUST CLAIMS TRANSPARENCY ACT

Sec.

11-67-1.	Short title.
11-67-3.	Declaration of legislative intent.
11-67-5.	Definitions.
11-67-7.	Required disclosures by the plaintiff.
11-67-9.	Identification of additional asbestos trust claims by defendant; trust record.
11-67-11.	Discovery; use of materials.
11-67-13.	Failure to provide information; sanctions.
11-67-15.	Application.

§ 11-67-1. Short title.

This chapter may be cited as the “Asbestos Bankruptcy Trust Claims Transparency Act.”

HISTORY: Laws, 2017, ch. 435, § 1, eff from and after July 1, 2017.

§ 11-67-3. Declaration of legislative intent.

(1) The Legislature finds and determines that:

(a) Asbestos is a mineral that was widely used for insulation, fireproofing, and other purposes;

(b) Exposure to asbestos has been causally associated with mesothelioma and lung cancer, as well as nonmalignant conditions such as asbestosis, pleural plaques, and diffuse pleural thickening;

(c) Approximately one hundred (100) employers have declared bankruptcy at least partially due to asbestos-related liability;

(d) Over ten thousand (10,000) companies have been named as asbestos defendants, including many small- and medium-sized companies, in industries that cover eighty-five percent (85%) of the United States economy;

(e) Scores of trusts have been established in asbestos-related bankruptcy proceedings to form a multibillion dollar asbestos bankruptcy trust compensation system outside of the tort system, and new asbestos trusts continue to be established;

(f) Asbestos plaintiffs often seek compensation both from solvent defendants in civil actions and from trusts or claims facilities formed in asbestos-related bankruptcy proceedings;

(g) There is limited coordination and transparency between these two (2) paths to recovery, which has resulted in the suppression of evidence in asbestos actions; and

(h) Justice is promoted by transparency with respect to asbestos bankruptcy trust claims in civil asbestos actions.

(2) Now, therefore, it is the intent of the Legislature to:

(a) Provide transparency with respect to asbestos bankruptcy trust claims in civil asbestos actions by creating a substantive right for defendants to obtain bankruptcy trust discovery;

(b) Reduce the opportunity for oversight or suppression of evidence in asbestos actions; and

(c) Enhance the ability of courts to oversee and manage asbestos cases.

HISTORY: Laws, 2017, ch. 435, § 2, eff from and after July 1, 2017.

§ 11-67-5. Definitions.

The following words and phrases as used in this chapter have the meaning ascribed to them in this section, unless the context clearly requires otherwise:

(a) “Asbestos” includes, without limitation, chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, asbestiform winchite, asbestiform richterite, asbestiform amphibole minerals, and any of these minerals that have been chemically treated or altered, including all minerals defined as asbestos in 29 CFR 1910 at the time the asbestos action is filed.

(b) “Asbestos action” means a claim for damages or other civil or equitable relief presented in a civil action by a plaintiff arising out of, based on, or related to the health effects of exposure to asbestos, including, but not limited to, loss of consortium, wrongful death, mental or emotional injury.

(c) “Asbestos trust” means a government-approved or court-approved trust, qualified settlement fund, compensation fund or claims facility created as a result of an administrative or legal action, a court-approved bankruptcy, or pursuant to 11 U.S.C. 524(g) or 11 U.S.C. 1121(a) or other applicable provision of law, that is intended to provide compensation to claimants arising out of, based on, or related to the health effects of exposure to asbestos.

(d) “Asbestos trust claim” includes, but is not limited to, any claim or demand for compensation for asbestos-related injuries from an asbestos trust.

(e) “Plaintiff” means the exposed person, deceased or living, and the person bringing the asbestos action, including a personal representative if the asbestos action is brought by an estate, or a conservator or next friend if the asbestos action is brought on behalf of a minor or legally incapacitated individual.

(f) “Trust materials” means a final executed proof of claim and all other documents and information related to a claim against an asbestos trust and any other information that the plaintiff submits to the asbestos trust, including claims forms and supplementary materials, affidavits, correspondence, depositions and trial testimony, work history, medical and health records, documents reflecting the status of a claim against an asbestos trust, and, if the trust claim has settled, all documents relating to the settlement of the trust claim.

(g) “Trust governance documents” means all documents that relate to eligibility and payment levels, including, but not limited to, claims payment

matrices, trust distribution procedures, or plans for reorganization, for an asbestos trust.

HISTORY: Laws, 2017, ch. 435, § 3, eff from and after July 1, 2017.

§ 11-67-7. Required disclosures by the plaintiff.

(1) Within thirty (30) days after an asbestos action is filed, or by August 1, 2017, whichever is later, the plaintiff shall do all of the following:

(a) Provide the court and parties with a sworn statement signed by the plaintiff, under penalties of perjury, that all asbestos trust claims that can be made by the plaintiff have been filed and that includes the following:

(i) A statement that an investigation of all asbestos trust claims has been conducted;

(ii) A list identifying each asbestos trust claim that has been filed by the plaintiff;

(iii) A list identifying each asbestos trust claim that can be made by the plaintiff, which has not been filed for the sole permissible reason that the cost of submitting an asbestos trust claim exceeds the plaintiff's reasonably anticipated recovery; and

(iv) Whether there has been a request to defer, delay, suspend, toll, withdraw, or otherwise alter the standing of any asbestos trust claim, and provide the status and disposition of each asbestos trust claim.

(b) Provide all parties with all trust materials, including trust materials that relate to conditions other than those that are the basis for the asbestos action and including all trust materials from all law firms connected to the plaintiff in relation to exposure to asbestos, including anyone at a law firm involved in the asbestos action, any referring law firm, and any other firm that has filed an asbestos trust claim for the plaintiff. Documents should be accompanied by a custodial affidavit from the asbestos trust, certifying that the trust materials submitted to defendants are true and complete.

(c) If the plaintiff's asbestos trust claim is based on secondary exposure to asbestos through another individual or individuals, the plaintiff shall produce all trust materials submitted by the other individual or individuals to any asbestos trusts if the materials are available to the plaintiff or the plaintiff's counsel.

(2) The plaintiff has a continuing duty to supplement the information and materials required under subsection (1) and the supplementation shall be made no later than thirty (30) days after the plaintiff supplements an existing asbestos trust claim, receives additional information or materials related to an asbestos trust claim, or files an additional asbestos trust claim.

(3) The court may dismiss the asbestos action if the plaintiff fails to comply with this section.

(4) An asbestos action may not be set for trial until at least one hundred eighty (180) days after the requirements of subsection (1) are met.

(5) Not less than thirty (30) days before trial in an asbestos action, the

court shall enter into the record a document that identifies every asbestos trust claim made by the plaintiff.

HISTORY: Laws, 2017, ch. 435, § 4, eff from and after July 1, 2017.

§ 11-67-9. Identification of additional asbestos trust claims by defendant; trust record.

(1) A defendant may file a motion requesting a stay of the proceeding on or before the later of the sixtieth day before the date of trial in the action is set to commence or any other such time for which the defendant has a good faith reasonable basis to request a stay. The motion shall identify the asbestos trust claims not previously identified that the defendant believes the plaintiff can file and include information supporting the asbestos trust claims.

(2) Within ten (10) days of receiving the defendant's motion, the plaintiff shall:

(a) File the asbestos trust claims; or

(b) File a written response with the court requesting a determination that the cost to file the asbestos trust claims exceeds the plaintiff's reasonably anticipated recovery.

(3)(a) Subject to paragraph (b) of this subsection (3), if the court determines that there is a basis for the plaintiff to file an asbestos trust claim identified in the motion to stay, the court shall stay the asbestos action until the plaintiff files the asbestos trust claim and produces all related trust claims materials.

(b) If the court determines that the cost of submitting an asbestos trust claim exceeds the plaintiff's reasonably anticipated recovery, the court shall stay the asbestos action until the plaintiff files with the court and provides all parties with a verified statement of the plaintiff's history of exposure, usage, or other connection to asbestos covered by that asbestos trust.

(4) An asbestos action may not be set for trial until at least sixty (60) days after the plaintiff complies with the requirements of this section.

HISTORY: Laws, 2017, ch. 435, § 5, eff from and after July 1, 2017.

§ 11-67-11. Discovery; use of materials.

(1) Trust materials and trust governance documents are presumed to be relevant and authentic, and are admissible in evidence in an asbestos action. A claim of privilege does not apply to any trust materials or trust governance documents.

(2) A defendant in an asbestos action may seek discovery from an asbestos trust. The plaintiff may not claim privilege or confidentiality to bar discovery and shall provide consent at the time of asbestos trust identification, including, but not limited to, authorization for release of trust materials or other expression of permission that may be required by the asbestos trust to release information and materials sought by a defendant.

(3) Trust materials that are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents are sufficient to support a jury finding that the plaintiff was exposed to products for which the trust was established to provide compensation and that, under applicable law, such exposure is a substantial contributing factor in causing the plaintiff's injury that is at issue in the asbestos action.

HISTORY: Laws, 2017, ch. 435, § 6, eff from and after July 1, 2017.

§ 11-67-13. Failure to provide information; sanctions.

(1) If the plaintiff files an asbestos trust claim after the plaintiff obtains a judgment in an asbestos action, and that asbestos trust was in existence at the time the plaintiff obtained the judgment, the trial court, on motion by a defendant or judgment debtor seeking sanctions or other relief, has jurisdiction to reopen the judgment in the asbestos action and adjust the judgment and order any relief to the parties that the court considers just and proper.

(2) A defendant or judgment debtor shall file any motion under this section within a reasonable time and not more than one (1) year after the judgment was entered.

HISTORY: Laws, 2017, ch. 435, § 7, eff from and after July 1, 2017.

§ 11-67-15. Application.

This chapter shall apply to all asbestos actions filed on or after July 1, 2017, and to all pending asbestos tort actions in which trial has not commenced as of July 1, 2017.

HISTORY: Laws, 2017, ch. 435, § 8, eff from and after July 1, 2017.

CHAPTER 69.**LIABILITY EXEMPTION FOR FURNISHING
INFORMATION CONCERNING INSURANCE FRAUD.**

Sec.

11-69-1. Immunity of persons or entities from civil liability for furnishing information concerning insurance fraud; applicability.

§ 11-69-1. Immunity of persons or entities from civil liability for furnishing information concerning insurance fraud; applicability.

(1) Except as otherwise provided in subsection (2) of this section, there shall be no civil liability imposed on and no cause of action shall arise against a person or entity for furnishing information concerning suspected or completed insurance fraud to any law enforcement, investigatory, prosecutorial or regulatory agent or agency, insurer, or statutory residual market plan. This shall not abrogate or modify common law or statutory privileges or immunities enjoyed by a person or entity. The prohibition of civil liability applies only to the act of reporting and does not limit civil liability against a person or entity for committing fraud or other tortious conduct.

(2) Subsection (1) of this section shall not apply to claims against persons where false statements were made in bad faith by persons furnishing information concerning suspected or completed insurance fraud. Any civil action brought against a person for filing a report or furnishing other information concerning insurance fraud shall be dismissed unless the party bringing the action has pleaded specifically that subsection (1) of this section does not apply because the person filing the report or furnishing the information did so in bad faith, and has pleaded specifically facts that support a claim of bad faith.

HISTORY: Laws, 2018, ch. 419, § 1, eff from and after July 1, 2018.

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